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Supreme Court of the United States

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY, APPELLANTS,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF STATE CORPORATION COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED MAY 19, 1949.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 3425

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer Thereof and in His Personal Capacity, Appellants,

versus

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission, Appellee

Petition for an Appeal and Supersedeas From an Order of the State Corporation Commission

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your Petitioners, Travelers Health Association, a non-profit corporation organized and existing under the laws of the State of Nebraska, and R. E. Pratt, Treasurer of said Association and a resident of the State of Nebraska, respectfully represent that they are aggrieved by a final order entered by the State Corporation Commission on January 5, 1948, whereby said Commission assumed jurisdiction over these Petitioners and entered a cease and desist order against Petitioners, restraining them from soliciting membership certificates of health insurance in this State through the use of the United States mails.

[fol. 2] Your Petitioners are advised that they are entitled, as a matter of right, to have such order reviewed by this Honorable Court, and respectfully ask that such a review be granted.

There is filed herewith a copy of the record in the hearings before the State Corporation Commission, but this petition is not to be regarded as Petitioners' opening brief since such brief will be filed in due course.

STATEMENT OF THE FACTS

The following facts were stipulated between Travelers Health Association and the State Corporation Commission:

"1. Travelers Health Association is a non-profit membership association incorporated for the past forty-two years

under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

"2. Travelers Health Association has not now nor has it ever had any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia.

"3. Each of the members of said Association receives by mail from Omaha, Nebraska, when accepted as a member, a membership certificate providing for certain health insurance benefits and requiring the member, from time to time, to forward by mail to Omaha, Nebraska, the actual cost of such protection through the payment of assessments as levied.

"4. Every application for membership is received and acted upon by the Association in Omaha. Every applicant regardless of his place of residence, is elected to membership in the offices of the Association in Omaha. All assessments to cover insurance costs, and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha and all insurance benefits are paid from the home office there.

"5. All notices to members are issued from the home office in Omaha, Nebraska, addressed to the members at their respective places of residence throughout the United States, and are then deposited in the United States Post Office in the City of Omaha for transmission through the United States mails to such members.

"6. New members are usually obtained through recommendations of existing members who submit to the Associa- [fol. 3] tion at its home office in Omaha the names of friends and acquaintances believed to be able to qualify for membership.

"7. The Association at Omaha then writes to each such person wherever he may reside, enclosing an application blank and suggesting that he apply for membership forthwith in order to secure the advantages of membership, which include health insurance protection and claim payments when ill. All such letters are transmitted by mail from the United States Post Office in Omaha.

"8. If upon receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank wherever he may reside and sends it by mail or delivers it personally to the home office of the Association in Omaha, where it is received and acted upon.

"9. Since beginning business, Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia in the manner indicated above. During such periods it has caused many claims to be investigated. Payment of claims has been made by mail from the home office in Omaha. The Association now has approximately eight hundred members (certificates in force) in Virginia.

"10. The only notice received by the respondents of this proceeding was the receipt on May 9, 1947, by registered mail of a copy of the proceeding as instituted, known as Case No. 8816, dated May 5, 1947.

"11. R. E. Pratt resides in Omaha, Nebraska."

The Petitioners entered a special appearance in opposition to the jurisdiction of the State Corporation Commission and that issue was argued by counsel before the Commission based upon the foregoing stipulation of facts, upon consideration whereof the Commission was of the opinion that jurisdiction of the Commission was established, and that the evidence as stipulated justified the conclusion that the activities of the Petitioners were contrary to the laws of the State of Virginia; whereupon an order was entered restraining Petitioners, through the United States mails or otherwise, from offering or promoting contracts of insurance in the State of Virginia.

Assignments of Error

Your Petitioners respectfully assign as error the following action by the Commission:

1. The decision of the Commission, proceeding under the Virginia Securities Act, Section 3848(52) of the Code of Vir- [fol. 4] ginia (1942) that it could assume and exercise jurisdiction over these non-resident Petitioners by substituted service of process in the form of notice sent by registered United States mails.

2. The decision of the Commission that the corporate Petitioner had committed acts in the State of Virginia in furtherance of the sale of its membership certificates.

3. The order of the Commission, proceeding under the Virginia Securities Act, Section 3848(52) of the Code of Virginia (1942), enjoining the non-resident Petitioners from the use of the United States mails, by means of intrastate or interstate communication, for the purpose of furthering or promoting contracts of insurance or indemnity in the State of Virginia.

4. The decision of the Commission that the enforcement of the aforesaid statute did not constitute an attempted regulation of the mails and Post Office Department of the United States, the right to regulate which is expressly and exclusively delegated to Congress by Section 8, Article 1, of the Constitution of the United States.

5. The decision of the Commission that assumption of jurisdiction over these non-resident Petitioners by substituted service of process, pursuant to the Virginia Securities Act, Section 3848(52) of the Virginia Code, did not deny Petitioners their rights without due process of law, and that enforcement of the aforesaid statute was no abridgement of the privileges and immunities of the non-resident Petitioners, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Statement of Position

Petitioners will in due course file their brief wherein their position with respect to the foregoing assignments of error will be fully argued and the authorities discussed. No extended argument will therefore be presented at this time. Briefly stated, however, the position of Petitioners is as follows:

1. Petitioners contend that the alleged service of process in this proceeding by registered United States mail was wholly void and that it conferred no jurisdiction upon the Commonwealth of Virginia or its agencies over the persons of the Petitioners. The action being one to enjoin the *personal activities* of the corporate an individual Petitioners was a proceeding *in personam* in which personal service was essential. This was not had and the Petitioners therefore

[fol. 5] contend that the attempted substituted service violated their rights under the due process clause of the Federal Constitution.

2. Admitting the right of imposition of conditions by a State upon foreign corporations who desire to enter sovereign boundaries, it is beyond its authority and power to regulate the activities of any individual or corporation beyond its territorial limits. The Petitioners further contend that Section 3848(52) of the Virginia Code, permitting service of process in an action "*in personam*" by mail beyond the territorial jurisdiction of the State is unconstitutional and void, and that any order affecting the person of the Petitioners by such attempted service and made pursuant thereto is unconstitutional and void.

3. Petitioners do not deny that, where a foreign corporation is carrying on a business and committing acts within the territorial limits of a State through its authorized agents, substituted service of process may be sufficient to confer jurisdiction where otherwise no jurisdiction would exist. But Petitioner corporation has never had any office, agent, official or property of any kind located in the Commonwealth of Virginia, and this fact was so stipulated between the parties to this action prior to the hearing before the Commission. The corporate Petitioner further contends that the mere depositing of letters in the United States Post Office in Nebraska, where it is incorporated and has its only office, cannot be considered the commission of acts or the operation of its business in the State of Virginia sufficient to confer jurisdiction upon Virginia courts by the method of substituted service of process.

4. The State Corporation Commission, pursuant to Section 3848(52) of the Virginia Code, has enjoined the Petitioners from advertising from within or from without the State through the use of *the mails* or otherwise, by intrastate or *interstate* communication, their contracts of insurance in the State of Virginia. It is Petitioners' contention that no State, nor instrumentality thereof, can constitutionally issue or enforce such an injunction inasmuch as it results in an indirect regulation of the use of the United States mails, the control and regulation of which is in the sole and exclusive power of Congress. The Petitioners are not unmindful of the scope of the "police powers" of this Commonwealth, but they earnestly submit that such

a power cannot be extended to encompass unconstitutional legislation.

Wherefore, Petitioners respectfully pray that an appeal and *supersedeas* be awarded them and that this Honorable [fol. 6] Court review and reverse the action of the State Corporation Commission, and that said cease and desist order by the State Corporation Commission be annulled and dissolved.

Copies of this petition were duly delivered to J. Lindsay Almond, Attorney General of the Commonwealth of Virginia, and to Blake T. Newton, of counsel for the Commonwealth in this case, on the 4th day of May, 1948.

Since Section 3734 of the Code (1942) provides for an appeal of right from the order complained of, counsel for petitioners do not desire to supplement what has been said in this petition by an oral statement of petitioners' reasons for seeking an appeal.

Respectfully submitted,

Travelers Health Association and R. E. Pratt, as Treasurer thereof and in his personal capacity,
By Hunton, Williams, Anderson, Gay & Moore,
Counsel.

Thomas B. Gay, Of Counsel.

I, Thomas B. Gay, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the rulings and order of the State Corporation Commission in the above case are erroneous, and that said order should be reviewed and dissolved.

Given under my hand this 4 day of May, 1948.

Thomas B. Gay.

Received May 4, 1948.

M. B. Watts, Clerk.

Appeal and *supersedeas* awarded. Bond $300.

Willis D. Miller.

May 17, 1948.
Rec'd May 17, 1948.

M. B. W.

[fol. 7] BEFORE STATE CORPORATION COMMISSION

Commonwealth of Virginia

At Richmond, May 5, 1947.

COMMONWEALTH OF VIRGINIA, at the relation of State Corporation Commission,

v.

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer Thereof, and in His Personal Capacity

Case No. 8816

ORDER INSTITUTING PROCEEDINGS, ETC.

Upon bases of facts gained from information received, and from the records of the Commission;

It appears, and it is charged, that the respondents enumerated in caption hereto have, within the State of Virginia, offered for sale, advertised for sale, or otherwise promoted or assisted, participated in or acted in furtherance of, the offer, advertisement or sale, or have otherwise promoted the distribution of, certain securities, represented to be contracts of insurance and/or indemnity in Travelers Health Association which, if a corporation, is chartered under the laws of some state other than Virginia, presumably of Nebraska; that the said Travelers Health Association appears to be an insurance company doing in Virginia only a mail order business which is not required to obtain a license under the Virginia Insurance Laws, but which by virtue of subdivision (p) of Section 3 of the Virginia Securities Law, is required to obtain an authorization under the said law; that, without first having qualified under the Virginia Securities Law, the said respondents offered for sale in Virginia securities, consisting of contracts of insurance and/or indemnity, amongst others not known to the Commission but well known to the respondents herein, to one William C. King, as appears from documentary data and reliable information; and that the said offers and sales have been, and are, in contravention of the said Virginia Securities Law; therefore,

The State Corporation Commission, in pursuance of, and in accordance with, the provisions of Section 6 of

the Virginia Securities Law, does hereby give at least ten [fol. 8] days' notice, and an opportunity to be heard, upon the question of whether or not a cease and desist order, in the nature of a permanent injunction, or restraining order, should be issued against Travelers Health Association, of Omaha, Nebraska, and against R. E. Pratt, as Treasurer thereof and in his personal capacity, at the address of each as shown in the record herein, and/or against either of them, ordering them, and/or either of both of them, to cease and desist, personally and/or through any employee, agent or representative, and/or through the medium of any advertisement, from within or without the State, through the mails or otherwise, from offering, advertising, promoting, selling, assisting or participating in, or acting in furtherance of, the offer, advertisement, sale and/or promotion in Virginia of contracts of insurance and/or indemnity, unless and until otherwise ordered, or unless and until permit or authorization shall have been issued by the State Corporation Commission according to law, and such cease and desist order duly vacated according to law;

It is further ordered, that a proceeding under Section 6 of the Virginia Securities Law be, and it hereby is, instituted, assigned Case No. 8816, and docketed; that Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, be made parties hereto; that process issue, and together with attested copies of this order, be served according to law as provided by Section 6 of the Virginia Securities Law, summoning the said respondents and each of them to appear at the courtroom of the State Corporation Commission, State Office Building, Richmond, Virginia, at 10:00 A. M., on the 19th day of May, 1947, and show cause, by answer or otherwise, if they, or either of them, can, why a cease and desist order, in the nature of a permanent injunction or restraining order, should not be issued against them, or either of them, in their several capacities, as may be proper, ordering them, or either of them, as may be found proper by the Commission, to cease and desist, jointly and severally, through representative or representatives, agent or agents, and/or through medium of advertisement from within or without the State, through the mails, or other media of communication, inter- or intra-state, from offering, advertising, selling, promoting, assisting or participating in, or acting in

furtherance of, the offer, advertisement, sale or promotion of the contracts issued by Travelers Health Association, [fol. 9] consisting of contracts of insurance or indemnity, and being offered and/or sold by, and/or on behalf of, the said company; and

It appearing that Travelers Health Association and R. E. Pratt are not residents of, and are not located in, and are not licensed to transact business in, the State of Virginia, and there being no way to obtain direct personal service on them or either of them;

It is further ordered, that attested copies of this order, upon which this proceeding is based and proposed, together with process hereinbefore directed to be served, be served, for the purpose of obtaining jurisdiction by service, as prescribed by Section 6 of the Virginia Securities Law, by forwarding, by registered mail, return receipt demanded, to their respective last known addresses, to Travelers Health Association and to R. E. Pratt, in accordance with the provisions of Section 6 of the Virginia Securities Law for such cases made and provided; and

It is further ordered, that this proceeding be placed on a secret docket and not made public until after the preliminary hearing, unless the Commission shall determine and order that it shall be kept on a secret docket after the preliminary hearing, as may be done in the discretion of the Commission, in accordance with the provisions of the last paragraph of Chapter 529, Section 6, Acts 1928, as amended.

BEFORE STATE CORPORATION COMMISSION

Commonwealth of Virginia

[Title omitted]

NOTICE OF SPECIAL APPEARANCE FOR DEFENDANTS

SIRS:

Please take notice that we appear specially for the defendants in the above entitled proceeding, for the sole purpose of objecting to the alleged jurisdiction of the Commonwealth of Virginia and of its State Corporation Commis- [fol. 10] sion, and of moving to set aside and quash service

of summons alleged to have been made upon said defendants, and for no other purpose.

Dated the 13th day of May, 1947.

Brown, Hubbard, Felt & Fuller, Attorneys for Defendants, Office and Post-Office Address, 814 First National Bank Bldg., Utica, New York.

To: State Corporation Commission, and N. W. Atkinson, Clerk of the Commission, State Office Building, Richmond, Virginia.

BEFORE STATE CORPORATION COMMISSION

Transcript of Hearing

Commissioner Downs: Proceed, Mr. King.

Mr. King: May it please the Commission, this is a cease and desist proceeding brought under Section 6 of the Virginia Securities Law and placed on the secret docket for the reason that the Securities Division, finding that there was quite a large amount of business done in this State by this Company, thought it best to have it on a secret docket until the Commission could decide it. Mr. Hubbard has filed a special appearance which will be found in the case jacket which Your Honors have, and in continuing the case a few days ago, I made a particular note of the filing that he was here on special appearance, and that is the way he is here today.

Mr. Hubbard, representing the respondents, and I have agreed to a Stipulation of Facts.

I think it well to put in the record the registered notices which we used as service in this case and service was had on all three of them, the Travelers Health Association, R. E. Pratt as Treasurer and R. E. Pratt personally. Here are the three notices I want to put in the record, and although we have stipulated the facts, I don't suppose Mr. Hubbard will object to my putting in some of the papers that came out from his Company. They were sent to me personally. I don't know how they got my name. They have had my name for sometime and I have been receiving literature from them, but only since coming to the State Corporation Com-
[fol. 11] mission have I known the purport of these things

by a company not licensed or claiming to be licensed in the State.

I will read the Stipulation of Facts and then I think the proper procedure will be for Mr. Hubbard to argue his special appearance. Of course Section 18 puts the burden on Mr. Hubbard anyway, and since he filed this special appearance, it is up to him to argue that question.

The Stipulation of Facts is as follows:

STIPULATION OF FACTS

"The following facts are hereby stipulated between Moses G. Hubbard, Jr., counsel for Travelers Health Association, et als., and William C. King, Director, Securities Division, State Corporation Commission:

"1. The Travelers Health Association is a non-profit membership association incorporated for the past forty-two years under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

"2. The Travelers Health Association has not now, nor has it ever had any office, officer, official, agent, representative, bank account nor any other real or personal property, tangible or intangible, located in the State of Virginia.

"3. Each of the members of said Association receives by mail from Omaha, Nebraska, when accepted as a member, a membership certificate, providing for certain health insurance benefits, and requiring the member from time to time to forward by mail to Omaha, Nebraska, the actual cost of such protection through the payment of assessments as levied.

"4. Every application for membership is received and acted upon by the Association at Omaha. Every applicant, regardless of his place of residence, is elected to membership at the offices of the Association in Omaha. All assessments to cover insurance cost and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha and all insurance benefits are paid from the Home Office there.

"5. All notices to members are issued from the Home Office in Omaha, Nebraska, addressed to the members at

their respective places of residence throughout the United States, and are then deposited in the United States Post [fol. 12] Office in the City of Omaha for transmission through the United States mail to such members.

"6. New members are usually obtained through the recommendations of existing members who submit to the Association at its Home Office in Omaha, the names of friends and acquaintances believed to be able to qualify for membership.

"7. The Association, at Omaha, then writes to each such person, wherever he may reside, inclosing an application blank and suggestion that he apply for membership forthwith in order to secure the advantages of membership which include health insurance protection and claim payments when ill. All such letters are transmitted by mail from the United States Post Office in Omaha.

"8. If upon the receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank, wherever he may reside, and sends it by mail or delivers it personally to the Home Office of the Association in Omaha, where it is received and acted upon.

"9. Since beginning business Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia in the manner indicated above. During such period it has caused many claims to be investigated. Payment of claims has been made by mail from the Home Office in Omaha. The Association now has approximately 800 members (Certificates in force) in Virginia.

"10. That the only notice received by the respondents of this proceeding was receipt on May 9, 1947, by registered mail of a copy of the proceedings as instituted, known as Case No. 8816, dated May 5, 1947.

"11. R. E. Pratt resides in Omaha, Nebraska.

(Signed) Moses G. Hubbard, Jr., William C. King."

At Richmond, September 2, 1947.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

v.

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity

[fol. 13] Case No. 8816.

STIPULATION OF FACTS.

The following facts are hereby stipulated between Moses G. Hubbard, Jr., counsel for Travelers Health Association, et als., and William C. King, Director, Securities Division, State Corporation Commission:

(1) The Travelers Health Association is a non-profit membership association incorporated for the past forty-two years under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

(2) The Travelers Health Association has not now, nor has it ever had any office, officer, official, agent, representative, bank account nor any other real or personal property, tangible or intangible, located in the State of Virginia.

(3) Each of the members of said Association receives by mail from Omaha, Nebraska, when accepted as a member, a membership certificate providing for certain health insurance benefits, and requiring the member from time to time to forward by mail to Omaha, Nebraska, the actual cost of such protection through the payment of assessments as levied.

(4) Every application for membership is received and acted upon by the Association at Omaha. Every applicant, regardless of his place of residence, is elected to membership at the offices of the Association in Omaha. All assessments to cover insurance cost and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha and all insurance benefits are paid from the Home Office there.

(5) All notices to members are issued from the Home Office in Omaha, Nebraska, addressed to the members at their

respective places of residence throughout the United States, and are then deposited in the United States Post Office in the City of Omaha for transmission through the United States mail to such members.

(6) New members are usually obtained through the recommendations of existing members who submit to the Association at its Home Office in Omaha, the names of friends and acquaintances believed to be able to qualify for membership.

[fol. 14] (7) The Association, at Omaha, then writes to each such person, wherever he may reside, enclosing an application blank and suggesting that he apply for membership forthwith in order to secure the advantages of membership which include health insurance protection and claim payments when ill. All such letters are transmitted by mail from the United States Post Office in Omaha.

(8) If upon the receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank, wherever he may reside, and sends it by mail or delivers it personally to the Home Office of the Association in Omaha, where it is received and acted upon.

(9) Since beginning business Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia in the manner indicated above. During such period it has caused many claims to be investigated. Payment of claims has been made by mail from the Home Office in Omaha. The Association now has approximately 800 members (Certificates in force) in Virginia.

(10) That the only notice received by the respondents of this proceeding was receipt on May 9, 1947, by registered mail of a copy of the proceeding as instituted, known as Case No. 8816, dated May 5, 1947.

(11) R. E. Pratt resides in Omaha, Nebraska.

Moses G. Hubbard, Jr., William C. King.

BEFORE STATE CORPORATION COMMISSION

at Richmond, January 5, 1948.

COMMONWEALTH OF VIRGINIA, at the relation of State Corporation Commission,

v.

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity

Case No. 8816

CEASE AND DESIST ORDER, IN THE NATURE OF A PERMANENT INJUNCTION, UNDER SECTION 6 OF THE VIRGINIA SECURITIES LAW

[fol. 15] This matter, which was instituted under, and in pursuance of, provisions of Section 6 of the Virginia Securities Law, by order entered herein under date of May 5, 1947, and had been continued from time to time by orders of continuance herein, came, in pursuance of latest order of continuance entered on July 28, 1947, on September 18, 1947, for hearing and consideration, and having been fully heard, was taken under advisement, and now comes on this day for final hearing and consideration, upon the order herein instituting this proceeding and constituting statement of facts and charges herein; upon the special appearance of the respondents herein, by Counsel; upon the appearance of the Director of the Securities Division; upon the record of issuance, forwarding by registered mail, return receipt demanded, and service, respectively, of process and notices, and of copies of said order entered herein May 5, 1947, instituting proceeding; upon the records of registry return receipt cards; upon stipulation of facts, dated September 2, 1947, and signed by Moses G. Hubbard, Jr., and William C. King, filed herein at the hearing hereof; upon exhibits filed herein, as same are identified by the Bailiff of the Commission and as appearing in the transcript of the proceedings had September 18, 1947, as aforesaid; upon the transcript by the Reporter of the Commission of proceedings before the Commission on the day aforesaid; upon the entire record in this proceeding; and upon written and oral argument of Counsel;

Upon consideration whereof, the State Corporation Commission is of opinion that the evidence of record herein establishes the jurisdiction of the Commission, under Section 6 of the Virginia Securities Law, to proceed to determine whether a cease and desist order, in the nature of a permanent injunction, should issue; that the evidence herein and the entire record sustain, in all substantial and requisite respects, the allegations of facts and charges made in the order herein of May 5, 1947, in its character as a statement of facts and charges; that the evidence in the record herein sustains the conclusion that the respondents herein, Travelers Health Association, in its corporate capacity and through its duly constituted officers and agents, and R. E. Pratt, as Treasurer of Travelers Health Association and through his respective duly constituted agents and representatives for such purposes, and in his personal capacity, without having previously complied with the requisite and applicable laws of the State of Virginia, have been engaged [fol. 16] in the conduct of an insurance business, and in the conduct of such business have solicited of and have issued to citizens of and residents in the State of Virginia membership certificates, and have otherwise offered for sale, advertised for sale, promoted, sold, disposed of, and distributed to residents of this Sate, such membership certificates, providing for certain health insurance benefits, through the mails, according to customary and usual practice in the conduct of such type of insurance business, and that the said parties respondent have, severally, in conjunction, and in succession, and through existing members, residents of the Commonwealth of Virginia, according to customary and usual practice in the conduct of such type of insurance business, thus committed acts in furtherance of the sale, and otherwise promoted the sale in Virginia, through medium of the United States mails, of securities within the definition and meaning of the term "securities," as used in the Virginia Securities Law; and that it is apparent from the evidence and the entire record herein, that at the time of instituting the proceeding it was proposed and intended by the said respondents, and each of them, to continue such activities in connection with such securities, as so defined; that such activities in connection with such securities, as so defined, in accordance with the practices which had been pursued for many years and were being

pursued at the time of the institution of this proceeding, would be contrary to the law and statutes of Virginia in force, and from time to time enacted for the protection of the citizens of Virginia in connection with the solicitation of insurance contracts and the issuing of policies of insurance, constituting, for the purpose of this proceeding, securities, as defined in the said Securities Law; and, therefore, that, in accordance with the provisions of the said Securities Law, particularly the provisions of Section 6 thereof, a cease and desist order, in the nature of a permanent injunction or restraining order, against Travelers Health Association, in its corporate capacity, and against R. E. Pratt, as Treasurer of Travelers Health Association, aforesaid, and in his personal capacity, jointly and severally, or through agents and/or representatives, by direct, personal solicitation, and/or by any means and/or media of communication, whether intra- or inter-state, should be issued, as in the ordering part hereinafter more in detail set forth; therefore,

It is adjudged, ordered and decreed, That Travelers Health Association and R. E. Pratt, as Treasurer thereof, [fol. 17] and in his personal capacity, be, and they hereby are, directed to cease and desist, and that they be, and they thereby are, enjoined and restrained, until the further order of the Commission to the contrary, personally, and/or through any employee, agent, or representative, and/or through medium of any advertisement from within or from without the State, and/or through the mails or otherwise, by intra- or inter-state communication, from offering, advertising, promoting, selling, assisting or participating in or acting in furtherance of, the offer, advertisement, sale and/or promotion in Virginia of contracts of insurance and/or indemnity, unless and until otherwise ordered, or unless and until permit or authorization by the State Corporation Commission shall have been issued according to law, or unless and until qualification shall have been effected under the Insurance Laws, and until this order to cease and desist shall have been duly vacated according to law;

It is further ordered, There appearing nothing further to be done in this cause, that the same be, and hereby is, dismissed from the docket of the Commission and the papers placed in the file for ended causes, but that leave be, and hereby is, reserved to the parties hereto, upon motion and

good cause shown, or to the Commission of its own motion, to reinstate the case upon the docket;

It is further ordered, That attested copies hereof be forwarded or delivered to the respondents herein, care and attention of Counsel, to Counsel for files of Counsel, and to the Director of the Securities Division, respectively.

BEFORE STATE CORPORATION COMMISSION

[Title omitted]

ORDER RE ORIGINAL EXHIBITS—May 3, 1948

It having been stipulated and agreed between counsel [fol. 18] representing the Commonwealth and the respondent that the original exhibits need not be copied into the record but may be certified to the Supreme Court of Appeals of Virginia and that they shall not be printed but may be used at the hearing on appeal;

It is hereby ordered that the following original exhibits be certified to the Supreme Court of Appeals with the transcript of the record as exhibits in the matter of Commonwealth of Virginia at the relation of State Corporation Commission v. Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, for use by the Supreme Court upon appeal, to be returned to the Commission upon the completion of such use, to-wit:

Exhibit No. 1, copy of letters of transmittal of summons and order and registry receipts therefor.

Exhibit No. 2, letter received by William C. King and printed matter enclosed therewith.

BEFORE STATE CORPORATION COMMISSION

OPINION: DOWNS, COMMISSIONER

On May 5, 1947, upon the basis of information supplied by William C. King, a resident of the state, and by the records in the several departments of the Commission, an order was entered by the Commission, which order constituted a statement of facts and charges upon which this

action was proposed and directed the respondents to appear on the 19th day of May, 1947, at the Courtroom of the Commission and show cause why a cease and desist order should not be entered, all in accordance with the provisions of Section 6 of the Virginia Securities Law (Chapter 408, Acts of 1918, as from time to time amended). Since the activities complained of were by mail from beyond the limits of the state, the order in compliance with the terms of the statute directed that jurisdiction be obtained by giving ten days' notice by registered mail, return receipt demanded, to the addresses of the respondents beyond the limits of the state. The order further directed that the proceeding be placed on the secret docket of the Commission in accordance with the discretionary power vested in the Commission by Section 6, aforesaid.

The registry receipt cards evidencing receipt by respondents of the notice and order, aforesaid, were duly received in the Clerk's Office of the Commission on the 12th day of [fol. 19] May, 1947. The proceeding, at the request of counsel for the respondents, was continued from time to time and finally came on for hearing on September 18, 1947. At this time a stipulation of facts was filed by the parties (See Record, page 10). Counsel for the respondents, at the bar of the Commission, admitted the receipt of actual notice by his clients and it appears that the procedure, directed by the statute, was strictly followed throughout. Likewise, it does not appear that the charges contained in the Commission's order of May 5, 1947, aforesaid, have been denied. Indeed, it appears from a consideration of the Stipulation of Facts, *supra*, that such charges have, in all substantial respects, been admitted.

There has been no effort to deny that the respondents, through medium of the mails from beyond the limits of the State, have offered for sale, advertised for sale, or otherwise promoted or assisted, participated in or acted in furtherance of the offer, advertisement and/or sale of membership certificates constituting contracts of insurance and/or of indemnity in Travelers Health Association, within this state, to residents of this state. No claim is made that such membership certificates do not constitute securities, as defined by Section 2 of the Virginia Securities Law, or that the activities of the respondents are not contrary to the letter and intendment of the statute. In effect, we are told that though the action has been brought in strict

accordance with the Statute and that the facts alleged are true, we are without jurisdiction to act by reason of certain supervening constitutional prohibitions which operate to avoid the proceeding. These contentions are based on the "privileges and immunities" and "due process" clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 8, Clause 7, thereof, granting Congress the power to establish post offices and post roads. We have carefully analyzed the position taken by the respondents, as the same has been set forth in oral argument and written Brief, and we are convinced that the principles of constitutional law invoked by them are inappropriate and have no application to the type of proceeding with which we are concerned in this case. It is observed that the respondents have devoted a considerable portion of their argument to the question as to whether or not Travelers Health Association is doing business in this state, the term "doing business" being considered in its technical limited sense. Respondents rely on the fact that their contacts with citizens of Virginia are by mail, that they are not doing business in Virginia and that they do not enter Virginia either personally or by agents. In [fol. 20] setting up this defense they lose sight of the nature of this action. They are not charged with doing business in Virginia but with offering and advertising for sale and promoting the sale of insurance contracts in Virginia by mail and the action is to foreclose them from these activities. Whether the action will suffice to actually stop them is beside the point. It will suffice to put them on notice of pertinent laws of Virginia, to give them an opportunity to be heard and the state an opportunity to determine the facts, and, if, after hearing, a cease and desist order is issued, the Commission will then be authorized to give such publicity to the order as it sees fit for the "information and protection of the public." (Section 6, Virginia Securities Law, *supra.*)

The legality of notice, *per se*, to support the proceeding is disputed. We do not believe that a sovereign state is powerless to protect its public against activities of the respondents and others similarly situated merely because they keep themselves outside the jurisdiction of the state, with the result that technical process may not be served. So far as the issues in this case are concerned, there is no need for technical process. That which the respondents call

"process" may be regarded, and is by Section 6 of the Securities Law referred to, as "notice" of the pendency of this proceeding.

The statement of a New Jersey court in a case dealing with a similar contention is pertinent to our discussion of this issue. That court said:

"So far as the present issues go there was no need for technical process; that which is called process may be regarded merely as statutory notice that the defendants could not do business here unless they complied with the regulatory requirements. The question of what character of notice of the restraint would lay the individual open to punishment under contempt proceedings or otherwise for disobedience is not before us." (*Wilentz* v. *Edwards*, 36 A. 2nd 423, 426, 134 N. J. Eq. 522.)

In the case of *Stevens* v. *Television, Inc.*, 162 A. 248, 111 N. J. Eq. 306, wherein the individual defendants were served by registered mail, forwarded to addresses beyond the boundaries of New Jersey, the court said in answer to an argument similar to that presented by the respondents here:

"The argument is that the suit is *in personam* and that [fol. 21] there can be no personal judgment without personal service within the state. As a general proposition the legal principle is correctly stated. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565. But the Fourteenth Amendment, which declares that no state shall deprive any person of life, liberty, or property without due process of law, is not invaded; * * * This is not a case seeking a personal recovery against the defendants; it is to foreclose them * * *. The statutory process puts them on notice. They have their choice of appearing and proving their innocence or the consequences, by staying away. They may submit to our jurisdiction or decline; in either event they will be estopped from denying it.

"That the state has the power to ordain against imposition in the sales of fraudulently represented securities is established law * * *. That it may prescribe the means of protection and the methods of enforcing them necessarily flows from the power to decree and the physical power to enforce its decree. Substituted service—with actual notice—is a valid exercise of the police powers and con-

sistent with due process of law provision of the Federal Constitution.

* * * * * * *

"Under the Blue Sky Law and duty of forwarding the process by mail is imposed upon the Attorney General. In substantial legal effect, the methods of service are the same except one is direct, the other indirect."

Again in *Wilentz* v. *Edwards, supra,* which case arose under the New Jersey Securities Law and provided for service much the same as that which is questioned in this case and in which case the court held that actions of this character were not within the class of actions *in personam,* which, under the doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565, must be accompanied, if against a non-resident, by personal service of process within the jurisdiction. In reaching this conclusion the court stated:

"The terms *in personam* and *in rem* came into our jurisprudence from the civil or Roman law where they seem to have been comprehensive and to have been always used in contradistinction to each other. They are of importance in [fol. 22] our legal system in determining the character of process necessary to institute suit; and here, too, the effort has been to maintain a sharp distinction. But nice accuracy has more than once yielded to the exigencies of a developing jurisprudence, and that which is not strictly a 'thing' has nevertheless been given the significance thereof in order to keep the power of the law abreast of changing conditions."

An appropriate discussion of this same principle is found in *International Shoe Company* v. *State of Washington,* 326 U. S. 310, 316, 90 L. Ed. 95, 101-2. Counsel for the respondents, in asserting that a conflict exists between the procedure outlined in Section 6 of the Virginia Securities Law and well-recognized constitutional principles, in our opinion, loses sight of the supervening fact that the action under consideration has as its object the protection which a sovereign state may afford its citizens against fraud or imposition, actual or potential.

In *Wuchter* v. *Pizzutti* (1928), 276 U. S. 13, 24, 72 L. Ed. 446, 451, the court said:

"These cases (referring to several cases previously cited) and others indicate a general trend of authority toward sus-

taining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

It has been strenuously argued that this proceeding is a penal one and that all rules in respect of penal proceedings should apply with full force. In presenting the view that this action is penal, as distinguished from remedial, respondents have gone beyond the limits of the section under which this case proceeds and have pointed to the terms of Sections 15 and 17. Neither of these sections are involved here and it will be time enough to determine the questions raised by the respondents if and when actions are laid under either one of the sections. No word found in or inference derived from Section 6, aforesaid, may properly, in our judgment, be said to impose penalties upon the respondents. It should be pointed out that the Legislature, in order that all question as to the nature of the act might be obviated, has declared in Section 20 thereof: "This act is hereby [fol. 23] declared to be remedial, except when clearly criminal or penal, and, subject to any applicable constitutional limitations, shall be liberally construed to effect its manifest objects and purposes, * * *."

If we are to agree with respondents, we must accept that the Commonwealth of Virginia cannot, because of provisions of the Federal Constitution, or because of principles governing freedom of the mails, offset, subject to practical limitations and in the only manner available, namely, through medium of publicity, an interstate mail campaign, which contravenes its policy, its laws, and the welfare and interest of its people by a proceeding based upon the same means of communication. By so agreeing, we must accept that our dual form of government, the integrity and sovereignty of the states, and the provisions of the Constitution of the United States enacted for the protection of the Federal Government and the people as a whole—in short, all these salutary provisions and principles—may become weapons in the hands of the lawless and the unscrupulous and could be perverted to the distinct detriment of the people of any state without any corresponding benefit to the people of the Country as a whole, or to the benefit of the people, generally, of any other state.

The gist of the position of the respondents is that, because of the giving of notice, as stated by them, only by mail, the Commonwealth of Virginia is powerless to prescribe a means, after affording every reasonable opportunity for actual notice and to be heard, to prevent an absolute contravention and nullification of laws enacted in pursuance of sound and well-settled principles of public policy, clearly within the scope of the police power of the state, provided for the reasonable protection of its citizens. Such a principle of law, involving, as it would, invasion of the reserved and inherent police power of the states, would pervert the provisions of the Constitution of the United States from their appropriate and proper purpose as a means of protecting and vindicating the paramount powers of the Federal Government into instrumentalities for the subversion of, and infringement upon, inherent and essential functions of the States.

We have given careful consideration to the arguments of counsel for the respondents but we cannot agree that the familiar principles of constitutional law, upon which such arguments depend, can be employed in this proceeding in a manner calculated to undermine its salutary purposes. Section 6 of the law has gone farther than the demands of "due process" require. The notice given is provided by the statute, not under the compulsion of the due process clause [fol. 24] but actually as a matter of grace and is intended merely to apprise the respondents of the pendency of the proceeding and of the opportunity afforded them to appear and be heard. They are free to make an election to appear or they may stay away. In statutes of this character, wherein the appropriate exercise of the police power of the State is involved, it appears that even provisions for hearing are matters of grace, for a state has not only the right but is charged with the duty to warn its citizens that an activity is being carried on in violation of its laws and without regard for safeguards and minimum standards prescribed by such laws which its people have come to rely upon and upon which they have a right to rely. That such warning may be given or that remedial action may be taken promptly upon receipt of knowledge of such activity and without necessity of notice or hearing, if such is necessary to safegard the health, safety or welfare of the public can no longer be denied. See *People* v. *Anderson*, 189 N. E. 338; *The City of Cincinnati* v. *The Cincinnati, Lebanon & North-*

ern Ry. Co., 4 Ohio Appellate Reporters 443; *Creaghan* v. *Mayor, etc., of Baltimore*, 104 A. 180. Accordingly, it is plain that the state may, in the reasonable exercise of its police power, act summarily in matters affecting the health, safety and general welfare of its citizens to the end that injury be forestalled. That the Virginia Securities Law is property classified as a police measure cannot be disputed, and that the primary purpose of Section 6, under circumstances such as are here presented, is to notify the public of Virginia to beware of such offerings, is not open to serious question. Notwithstanding these facts, the Legislature, out of regard for the far-reaching and irreparable consequences which might attend more summary action against enterprises dealing in securities which, by their very nature, are extremely sensitive to publicity and knowing that such publicity might be as deleterious to the public as to the enterprise proceeded against, saw fit to provide an orderly procedure which would guarantee action only after notice and an opportunity to be heard. Thus it may be seen that here we are dealing not with a breach of the constitutional guaranties of due process but rather with a statute which, while it might have authorized the Commission to deal with respondents in quite a different and more arbritary fashion, has in fact gone far beyond the ordinary requirements of due process to accord that degree of fairness which it is charged with denying.

It is well settled that the state may within the reasonable exercise of its police power recognize the possibilities for the practice of fraud or imposition upon its citizens through [fol. 25] the offer, advertisement, and/or sale of securities and so require all those who would vend such securities to its citizenry to first meet certain stautory requirements, having as their object the prohibition of fraudulent securities and the authorization only of those which involve no fraud, actual or potential, and then only after full disclosure of the facts. "Registration of all securities, whether good or bad, required by state blue sky laws have been upheld as no violation of the due process clause." *Jones* v. *Securities & Exchange Commission*, 79 F. 2nd 617; see also *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stockyards Co.*, 242 U. S. 559, 61 L. Ed. 493; *Merrick* v. *Halsey & Co.*, 242 U. S. 568 61 L. Ed. 498. Possessing this power, which proceeds from a recognition of the potential injury which may be done to the unprotected

citizens, it is manifest that such power is wholly ineffectual unless statutes, passed in its exercise, are strengthened by implements impelling their observance. Thus has the Legislature of Virginia, in our opinion, approached the problem. First, under Section 2 of the law, the term "security" is broadly defined. Under Section 3, certain of such securities are required to be qualified before an offer, advertisement, or any act in furtherance of a sale be made or undertaken in the state. Such a security is that with which we are concerned in this proceeding. It is clear that the membership certificate of the respondents is a security by definition and is such a security as is required by the law to be qualified before any attempt is made to solicit the people of Virginia. It is likewise clear from the record that no qualification has been effected and that no exemption, as contained in Section 4 of the act, is available. It is admitted that activities interdicted by the statute have been carried on and are proposed to be carried on in defiance of the statute. Under such circumstances, provision has been made by the Legislature for proceeding under Section 6 of the law, and/or in appropriate cases, for a proceeding under Section 15 of the law. Acting under the authority of Section 6, this proceeding was instituted.

Respondents insist that this proceeding is void for, through it, the Commonwealth is undertaking to extend the effect of its statutes beyond the boundaries of the state. Accordingly, we must ascertain the nature and effect of an action brought under Section 6 of the Virginia Securities Law.

"Whether a statute or law secures due process depends on the subject on which it operates and the character of the [fol. 26] rights affected thereby and regard must always be had to the character of the proceeding involved . . ." (16 C. J. S. 1153, also, see *Crane* v. *Hahlo*, 258 U. S. 142, 66 L. Ed. 514, and *Humboldt Land & Cattle Co.* v. *District Court of Sixth Judicial District*, 224 P. 612.)

Also, see *Riley* v. *Sweat*, 149 So. 48, 51, to the effect that:

"Therefore, whenever a judicial proceeding is invoked for the purpose of conserving constitutional rights as against the incidence of restrictive statutes, the test of validity is not what is set forth in the letter of the act, but how

the statute is operative in its practical application and effect."

In dealing with respondents, and others similarly situated, upon proof of the charges made, the Commission is authorized to enter a cease and desist order directing the respondents to discontinue those activities found to be in violation of the statute until such time as they may have complied therewith. The statute provides that attested copies of such order shall be forwarded by registered mail, return receipt demanded, to the respondents at the addresses to which notice of the proceeding was forwarded or to such later address or addresses as may have become known and to give such other publicity as it may see fit.

There is no element of compulsion except such as may flow from a dread of the publicity attending such an order. In such cases, the only weapon available to the Commonwealth is to publicly advise that the securities of the respondent do not bear the stamp of the state's approval and are being presented to the public without regard to the regulatory laws enacted to protect them. Section 6, *supra*, imposes no penalties, exacts no direct toll from those against whom its orders proceed. Its purpose, admittedly limited, is, after a full consideration of facts adduced in support of charges, to call on those found to be violating the provisions of the statute to halt and to fully apprise the public of Virginia that to deal further with such violators is to deal at their peril. This, we are confident, the state may properly do under its police power, which has been likened to the right of self-preservation in an individual. See *New York & N. E. R. Co.* v. *Town of Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Panhandle Eastern Pipe Line Co.* v. *State Highway* [fol. 27] *Commission of Kansas*, 294 U. S. 613, 79 L. Ed. 1091. When viewed in this fashion; the constitutional principles urged upon us by the respondents present no difficulty, for while they may be appropriate to the case as outlined by them, that case is not before us.

For these reasons we believe that the respondents have seriously misconceived the natural consequences of a proceeding under Section 6 of the law and as a result have been led into error in stating in written brief of counsel: "Hence, the sole and only issue involved is whether Virginia can enjoin a resident of Nebraska while present in Nebraska, from performing acts and engaging in business

entirely lawful and proper in Nebraska, and can then hold him in contempt for violation of such injunction."

The final argument of respondents rests on the claim that the law involves an unconstitutional attempt to regulate the use of the United States' mail. We believe that our discussion of the nature and effect of actions taken under this section of the law demonstrates that no such regulation is or can be involved. Accordingly, we find no ground either in reason, principle or authority to sustain respondents' contentions and an order in accordance with this opinion and the provisions of the Virginia Securities Law will be issued.

BEFORE STATE CORPORATION COMMISSION

CERTIFICATE OF CHAIRMAN

Pursuant to an order entered herein on the 3rd day of May, 1948, the original exhibits listed therein, all of which are in the custody of the State Corporation Commission, are hereby certified to the Supreme Court of Appeals, and the said Court is respectfully requested to return the same to this Commission upon the final determination of this proceeding.

It is hereby certified to the Supreme Court of Appeals that the foregoing transcript of the record in this proceeding, when read in connection with the original exhibits hereinabove mentioned, contains and sets out all the facts and evidence upon which the action of the Commission in this proceeding was based and which are essential to a proper decision of the appeal to be taken from such action, and is also a true transcript of the proceeding and orders of the Commission of said proceeding.

Witness the signature of W. Marshall King, Chairman of the State Corporation Commission, under its seal, attested [fol. 28] by its Clerk, this 4th day of May, 1948, and in the 172nd year of the Commonwealth.

W. Marshall King, Chairman. (Seal.)

Attest: N. W. Atkinson, Clerk of the Commission.

BEFORE STATE CORPORATION COMMISSION

CERTIFICATE OF CLERK

I, N. W. Atkinson, Clerk, State Corporation Commission, do hereby certify that proper notice was given of the intention to apply for a transcript of the record in this case as the basis for appeal to the Supreme Court of Appeals of Virginia, pursuant to the provisions of Section 6339, Code of Virginia, 1919.

N. W. Atkinson, Clerk, State Corporation Commission.

A Copy—Teste: M. B. Watts, C. C.

[fols. 29-59] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 3425

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof and in his personal capacity, Appellants,

against

COMMONWEALTH OF VIRGINIA, at the relation of State Corporation Commission, Appellee

Upon an appeal from and supersedeas to an order entered by the State Corporation Commission on the 5th day of January, 1948.

JUDGMENT—Jan. 10, 1949

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the same be; and is hereby, affirmed, and that the appellants pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said State Corporation Commission.

[fol. 60] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 3425

Present: All the Justices.

TRAVELERS HEALTH ASSOCIATION, et al.

v.

COMMONWEALTH OF VIRGINIA, EX REL., &C.

From the State Corporation Commission

OPINION BY JUSTICE ABRAM P. STAPLES—January 10, 1949

This is an appeal from a cease and desist order entered by the State Corporation Commission on May 3, 1948. The order enjoined and restrained the appellants from offering, advertising, promoting, or selling certain membership certificates or contracts of indemnity or insurance in Virginia, until a permit or authorization so to do has been secured from the Commission as required by the Virginia Securities Act. (Chapter 529 of the Acts of Assembly, 1928, as amended, generally known as the Blue Sky Law. See Michie's 1942 Code of Virginia, sections 3848(47) to 3848(66) Inc.).

Section 9 of the act required every person, association, or corporation, desiring to engage in the selling or offering for sale of securities of this type in Virginia to apply for a permit so to do. Certain conditions must be complied with before a permit can be granted. Irrevocable consent [fol. 61] must be filed that action or suit may be commenced against the permittee by the service of process on the Secretary of the Commonwealth, who, in turn, is required to transmit same by mail to the permittee. The applicant is also required to provide detailed information with reference to the solvency of the issuer of the securities and with respect to various other matters relating to the propriety of permitting their sale. The Commission is authorized to conduct such investigations as it may deem appropriate, and also see to the proper application of the proceeds from the sales of the securities. There are numerous other provisions, but the foregoing are sufficient for our purposes. The appellants do not deny that their membership contracts constitute "securities" within the

meaning of the law, or that they are lawfully and properly so classified. Nor do they claim to have applied for or secured the required permit to sell them in Virginia.

Section 15 of the act (Michie's Code, section 3848(61) provides that any person violating the act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a fine or confinement in jail, or both. Proceedings to enforce the penalties of such [fol. 62] violations must be instituted by indictment or information in the appropriate courts of record of the State.

Section 6 of the act (Michie's Code, section 3848(52)) authorizes the State Corporation Commission, upon its own motion, or upon complaint of any resident of the State of violation of the act, to issue a cease and desist order, in the nature of a temporary injunction and restraining order against further violations, after at least ten days notice, by registered mail to persons, corporations, or associations upon whom personal service cannot be had because of absence from the State. Signed receipt of the registered notice is required to be returned by the postal authorities.

Section 17 authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the act.

Pursuant to section 6, *supra*, this proceeding against the appellants was instituted by order of the Commission on May 5, 1947. They were charged with offering for sale and selling the securities in question without having procured the necessary permit or authorization and in contravention of the provisions of the Virginia Securities Act. Notices of the proceeding were sent to the appellants by registered mail, and the Post Office registry receipts, filed [fol. 63] as exhibits, showed the delivery of same. The notice informed the appellants that at the time indicated they would be given an opportunity to be heard upon whether a cease and desist order would be entered against them.

The appellants appeared specially by their counsel "for the sole purpose of objecting to the alleged jurisdiction of the Commonwealth of Virginia and of its State Corporation Commission, and of moving to set aside and quash service of summons alleged to have been made upon said defendants, and for no other purpose." They challenged the jurisdiction of the State and of the State Corporation

Commission upon two broad general grounds: first, that the appellants have conducted no business activities in Virginia, but have transacted their entire business outside the State through the mails; and, second, that, the order of the Commission being in its nature *in personam,* service of notice outside the State by registered mail is not sufficient to confer jurisdiction upon the Commission to take any action with respect to the appellants. The case was heard upon a stipulation of certain facts, and also upon exhibits introduced in evidence.

After the hearing the Commission entered the order complained of. It recited the finding by the Commission [fol. 64] that the appellants had been engaging in the business of selling their securities in Virginia without complying with the Virginia Securities Act and enjoined them from continuing such activities without such compliance.

It is settled beyond controversy, and not disputed by the appellants, that the regulation of the promotion and sale of securities is a proper exercise of the police power of the States. *Virginia Brewing Co.* v. *Webber,* 167 Va. 67, 187 S. E. 447; *Watters & Martin* v. *Homes Corp.,* 136 Va. 114, 116 S. E. 366. The purpose of laws regulating such promotions and sales is to protect the public against the imposition of fraudulent or unsubstantial schemes or projects, or from being misled into the purchase of securities based upon them. Such statutes do not conflict with or violate any provisions of the Federal Constitution.. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539. Therefore, our first inquiry is directed to whether the activities of the appellants in the Commonwealth of Virginia have been such as to subject them to the State's regulatory power.

It appears from the stipulation of facts that the appellant, Travelers Health Association, is a nonprofit member- [fol. 65] ship association incorporated under the laws of Nebraska, with its home office in Omaha. Letters and other exhibits filed in the case show that the appellant, R. E. Pratt, is a resident of Omaha, is treasurer of said association, and conducts its correspondence soliciting new membership contracts. The association has not now nor has it ever had any office, officer, or agent, or any bank account or property located in Virginia. At the time of the hearing it had in force in Virginia approximately eight hundred membership certificates which provided health insurance protection in the form of sickness benefit payments. It

also admitted that it has caused many claims asserted by its Virginia members to be investigated in this State. The customary method of soliciting new memberships has been for the Virginia members of the association to recommend to it persons who they believe are likely prospects. The association then writes these persons inviting them to make application for membership. All such letters are transmitted by mail from the United States Post Office in Omaha. If upon the receipt of this letter the proposed applicant is so disposed, he fills out the application blank and sends it by mail to the home office of the association in Omaha, where it is received and acted upon.

The exhibits contained in the record include a letter from [fol. 66] appellant Pratt, as treasurer of the association, addressed to a prospective member. The letter was accompanied by an application form containing twenty-six questions to be answered by the applicant, who is instructed after he has signed it to forward it "with membership fee to R. E. Pratt, Treasurer," Omaha, Nebraska. The application contemplates reference to a named person as to the applicant's character and standing. There also appears upon the application the following:

"Money Back Guarantee"

"Our policies are issued subject to approval of the applicant. If not satisfactory they may be returned within ten days from date of issuance and all money paid thereon will be refunded promptly."

In addition to the foregoing, there was also enclosed with the letter of solicitation a separate printed "Absolute Guarantee" slip containing a provision in conformity with the one above quoted. On the face of this slip appears the following:

"Note—It is not necessary to show the name of anyone as recommending you, as you have already been recommended to us by one of our members."

On the reverse side of said guarantee slip appears a [fol. 67] printed copy of a letter from one of the members of the association residing at Baltimore, Maryland. In this letter the member in question expresses thanks for the promptness with which the association had paid benefits on account of his recent illness, and concludes with the following statement: "I am working on several of my friends to get them

to join and expect to send you several applications real soon."

The appellants insist that the foregoing facts are insufficient to show any activities on their part in Virginia which bring them within the regulatory jurisdiction of the Commonwealth. In their reply brief they state their position thus: "* * * as the Stipulation of Facts on which this proceeding is based clearly establishes, there has been no solicitation by any agent in this State and all of the activities complained of take place, not in Virginia, but at the corporate appellant's principal office in Omaha, Nebraska. It is there that all mailing is done by appellants, all applications accepted, all contracts made and all claims paid."

The stipulation shows, however, that practically all of the business of the association in Virginia originates with and is the result of the activities of its Virginia members. [fol. 68] The extent of those activities is not clearly defined, but the action of the association in mailing to prospective members a copy of the letter received by it from its Baltimore member, stating that he was working on several friends and *expected to send in their applications*, constitutes an implied invitation, not only to send in the names of persons recommended for membership, but also to solicit and send in completed applications for membership. While the old members who are engaged in these activities of assisting in procuring new members have not been technically designated as agents of the association or specifically employed to solicit for it, nevertheless, its encouragement of same and acceptance of the fruits thereof constitute a ratification of their efforts in its behalf and renders it responsible therefor. The exhibits show also that the recommendation of the prospective member which is sent to the association by the old member is accepted without question and the prospective applicant is relieved of the usual requirement of furnishing any reference at all as to his qualifications for membership. It clearly appears that the association relies almost exclusively on these activities of its Virginia members to bring about an expansion of its Virginia business.

An additional Virginia activity lies in the fact that it has been customary for the appellant association to make [fol. 69] investigations with respect to the validity of claims asserted against it arising in the State. Such investigations

obviously constitute an essential function of the health insurance business.

Remittances in payment of benefit claims are sent from Omaha, but they are received and accepted *in Virginia* as a discharge of the association's obligations. If they miscarry in the mails and are not received by the beneficiary, or, if received, are not accepted, the obligations are not discharged.

Moreover, the fact that the application is accepted in Nebraska and the membership certificate is forwarded to the Virginia applicant *subject to his approval* renders it merely an offer on the part of the association to enter into the contract with the applicant. It is not contended that the applicant has theretofore ever examined or even seen the membership certificate, and it is left entirely to him to determine, after he receives it, whether its provisions are satisfactory and he will accept it. If he is not satisfied, he returns the certificate and receives back the amount tendered in payment with his application. If on the other hand he approves the provisions of the certificate and accepts it, it is this act of acceptance in Virginia which consummates the contract.

The State Corporation Commission concluded that the [fol. 70] foregoing activities of the appellants were such as to constitute violations of the Virginia Securities Act and to bring them within the jurisdiction of the State. It therefore ordered the appellants to cease and desist from any further continuation of such violations.

The appellants, however, take the position that such activities are not sufficient to subject them to the regulatory police powers of the State as set forth in the Virginia Securities Act and in the order of the Commission. They rely upon *Minnesota Commercial Men's Association* v. *Benn*, 261 U. S. 140, and other similar cases, in support of their position that the appellant association is not engaged in business activities in Virginia such as to bring them within the jurisdiction of the courts of this State. While the facts in the *Benn* case were quite similar to those in the record before us, the action there under consideration was one brought in Montana *by a beneficiary of a contract* which was held by a Montana resident at the time of his death. A Montana statute provided that any corporation doing business therein, if no officer or agent be found in that State, could be served with summons upon the Secretary of State, "who shall be and is hereby

constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said secre- [fol. 71] tary of state shall be deemed personal service upon said corporation." The court held that the Minnesota association was not doing business in Montana, and, therefore, the service of summons upon the Secretary of State did not constitute service upon the corporation so as to authorize the rendition of a *pecuniary civil judgment* against it.

The proceeding here before us, however, is essentially different in its nature. It was instituted, not by a contract holder, but by the Commonwealth. The appellants were being investigated by the Commission to determine whether their activities did in fact violate the Securities Act and constitute the commission in Virginia of a misdemeanor. The inquiry is quasi-criminal in its approach.

This distinction with respect to acts which violate State laws is clearly recognized in *Merrick* v. *Halsey & Co., et als.*, 242 U. S. 568. In that case a Michigan District Court of the United States had entered a decree enjoining the enforcement of the Blue Sky Law of that State against a partnership composed of residents of New York and New Jersey. They were engaged in selling stocks, bonds, and other secu- [fol. 72] rities, *by mail* to persons in the State of Michigan, though they had no place of business or agents in the State. Upon appeal the Supreme Court reversed the District Court, dissolved the injunction and sustained the power of the State of Michigan to regulate their sales of securities *through the mails.*

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, process in a criminal proceeding was served on a soliciting agent of the Harvester Company, which had been indicted for alleged violation of the antitrust laws of the State of Kentucky. The company contended that its activities within the State were not sufficient to subject it to the jurisdiction of the State courts. The claim of the company was that its agents were engaged exclusively in interstate commerce and, for this reason, were exempt from local regulatory control. Upon this question the court had the following to say:

"• • • The contention comes to this: so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business. This is in-

deed, as was said by the court of appeals of Kentucky, a novel proposition, and we are unable to find a decision to [fol. 73] support it, nor has one been called to our attention.

* * * * * * *

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state." (234 U. S., at pages 587, 588 and 589.)

In the foregoing case, *criminal process* had been served on an agent of the company who had not been designated as an agent to receive summons on behalf of the company, but the validity of the service was, nevertheless, sustained by the Kentucky Court of Appeals, and this was affirmed by the Supreme Court.

The principal question presented here is whether the Commonwealth has jurisdiction to regulate appellants' sale of securities through the mails, supplemented by such other activities in the State as we have described. Where such sales are in violation of the regulatory provisions and constitute a crime under the laws of the State, are the violators [fol. 74] subject to the jurisdiction of the State to punish for such violations? In other words, does the Commonwealth possess the jurisdiction and power to deal with the commission of crimes of this nature within its borders and punish same, although the transactions are principally carried on from without the State through the United States mails?

The general rule is thus stated in 14 Am. Jur., Criminal Law, section 227:

"A question often arises as to the jurisdiction of a crime where the accused, while in one state, sets in motion a force which operates in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person in another state with intent to injure him. In such cases the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime

is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act. * * *."

In *Palliser* v. *United States*, 136 U. S. 514, 518, the following was said:

"When an offense is committed by means of a communi-
[fol. 75] cation through the postoffice, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter." (Citing Authorities.) "But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, * * *." (Citing Authorities.)

United States v. *Steinberg et al.*, 62 F. (2d) 77, involved the jurisdiction of a United States District Court of New York to indict and punish a defendant who was accused of using the United States mails to defraud. The letter in question was mailed in Canada, and the defendant claimed that he had not committed any criminal act within the State of New York and that court was without jurisdiction to try the offense. In affirming a judgment of conviction by the District Court, the Circuit Court of Appeals of the Second Circuit used this language:

"* * * It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit. *Strassheim* v. *Daily*, 221 U. S. 280, 284, 285, 31 S. Ct. 558, 55 L. Ed. 735; Lamar v. U. S., 240 U. S. 60, 64, 65, 66, 36 [fol. 76] S. Ct. 255, 60 L. Ed. 526; Ford v. U. S., 273 U. S. 593, 620, 621, 47 S. Ct. 531, 71 L. Ed. 793. The constitutional question is frivolous." (62 F. (2d) 78).

The Supreme Court denied a writ of certiorari to review this case. *Steinberg* v. *U. S.*, 289 U. S. 729.

Additional authorities to the effect that a person may be guilty of crime by reason of the use of the United States mails, and that the crime is deemed to be committed in the State where the mail is received and the prohibited results occur, are found in 22 C. J. S., Criminal Law, sections

134, 135. See also annotations in 42 A. L. R. 272; 43 A. L. R. 545; 141 A. L. R. 239, *et seq.*

We hold, in view of the authorities referred to, that the evidence in possession of the State Corporation Commission constituted good cause to conclude that the appellants had been engaged in selling securities in Virginia through the United States mail without complying with, and in violation of, the provisions of the applicable laws of the State.

In this situation, it seems that the Commission might have been justified in seeking an information or indictment in [fol. 77] the appropriate court in accordance with the provisions of section 15 of the Virginia Securities Act. This section provides that violation of the act constitutes a misdemeanor, punishable by a fine or confinement in jail, or both. If such information were issued by the prosecuting attorney or indictment found by the grand jury, extradition proceedings might have been had under section 6 of the Uniform Extradition Act, which was adopted by Nebraska Laws 1935, chapter 66, on May 23, 1935, and by the Acts of the General Assembly of Virginia, chapter 305, on March 28, 1940. This Uniform Act authorizes the Governor of Nebraska to grant extradition in cases where crimes are committed in another State, even though the accused was not in that State at the time of the commission of the crime and had not fled therefrom.[1]

---

[1] The Uniform Extradition Act, according to the "Handbook on Interstate Crime Control," prepared by the Interstate Commission on Crime, at the time it was published in November, 1942, had been adopted in thirty-one of the States of the Union. Section 6 is as follows:

"Sec. 6. *Extradition of persons not present in demanding state at time of commission of crime.* The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

[fol. 78] Instead of resorting to an information or indictment, however, the Commission elected to proceed under section 6 of the Virginia Securities Act by giving notice to the appellants to show cause why a cease and desist order should not be issued by the Commission restraining them from making further sales of securities in Virginia in violation of its laws. This proceeding is somewhat analogous to the customary preliminary hearing, conducted in cases where an accused is suspected of having committed a felony, to determine whether the charge against him is supported by sufficient evidence to justify laying it before a grand jury. The chief difference is that, in the proceedings here under review, the question to be determined was whether the evidence justified a finding that the Virginia Securities Law was being violated and supported the consequent order to discontinue such violations. The Commission found that the evidence was sufficient to show that such law was being violated, and we concur in that view and in the propriety of the entry of the order requiring such discontinuance.

The appellants insist that the notice served on them by registered mail does not meet the requirements of due process because they were not present within the State and the notice was served on them in Nebraska. It may be true that the business of the appellant association in Virginia [fol. 79] has not been sufficiently extensive to justify the State in requiring it to appoint the Secretary of the Commonwealth as an agent upon whom process may be served at the suit of its Virginia contract holders. We are not called upon here to decide that question. It has been said that under some circumstances to require a corporation to defend, away from its home, a suit not arising out of its transactions in the territory of the forum might "lay too great and unreasonable a burden on the corporation to comport with due process." See *International Shoe Co.* v. *State of Washington*, 326 U. S. 310, 317.

Service of process upon nonresidents of a State by registered mail in appropriate cases is a well-established practice. We sustained the validity of a Virginia statute which imputes to one using the highways of the State an agreement that service upon such user may be had by serving the process upon the Director of the Division of Motor Vehicles of Virginia, the Director being required to send it to the nonresident defendant by registered mail at his

last known address. We held that such process so served is sufficient to bring a nonresident within the jurisdiction of a Virginia court and amenable to its judgment in a civil action arising out of the negligent use of the highways. *Carroll* v. *Hutchinson*, 172 Va. 43, 200 S. E. 644. The validity of similar State statutes has been sustained by the [fol. 80] United States Supreme Court. *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzuti*, 276 U. S. 13.

In *Wilentz* v. *Edwards*, 134 N. J. Equity 522, 36 Atl. (2d) 423, notice by mail to a nonresident of a hearing, which arose under the Blue Sky Laws of New Jersey, was sustained as conforming to the requirement of due process.

In *International Shoe Co.* v. *State of Washington, supra*, the Supreme Court sustained the jurisdiction of the Washington State courts to entertain an action for the recovery of unemployment compensation taxes arising out of salaries paid the agents of the company for their services in soliciting orders in the State, although the authority of the solicitors was strictly limited to taking orders and submitting them to the home office of the company in St. Louis, Missouri. In that case, Mr. Chief Justice Stone had the following to say:

"Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due proc- [fol. 81] ess requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' • • •

• • • • • • •

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of

process has been given. * * *." (326 U. S. 310, 316-317).

And in connection with the question whether the substituted service gives reasonable assurance that the notice will be actual, the opinion continues:

"* * * Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. * * *." (326 U. S. 320).

We think the service of the notice by registered mail with the return postal receipt showing its delivery as required by the statute meets the requirements laid down [fol. 82] in the *International Shoe Co.* case. The only complaint which the appellants are called upon to answer in the proceeding prescribed by the statute is one involving the question of their violation of the laws of Virginia with respect to the sale of their securities. This is a question which cannot be tried by any tribunal save those of this State, and therefore the appellants are subjected to no undue inconvenience.

Nor do we think the proceedings instituted by the Commission offend "traditional notions of fair play and substantial justice." As we have pointed out, the Commission might have undertaken to proceed against the appellants by information or indictment and extradition. The present proceeding is a very much less onerous one and is more favorable to the appellants, in that they are afforded an opportunity, without being subjected to a criminal trial, to have determined by the Commission, by this court, and also by the Supreme Court of the United States, if they so desire, the question whether their conduct has been such as to violate the criminal laws of the State and subject them to the process of its courts.

Appellants also contend that the Virginia securities law, as applied by the Commission, is an unconstitutional at- [fol. 83] tempt to regulate the use of the United States mails. We do not so construe the act. The effect of the order is to restrain the appellants from using the United States mails in such manner as to commit a criminal act in the State of Virginia. We do not believe it can be successfully contended that the postal service, which was established and is operated by the States in their joint capacity

as the Government of the United States, can be held to operate as a shield to protect persons in the commission of crime in any of the several States, nor has any authority in support of such a proposition been called to our attention.

Appellants also take the position that Subchapter I of Chapter 2A of Title 15 of the United States Code, Annotated, manifests an intention by Congress, through the Securities Exchange Commission, to occupy the field of regulating the sale of domestic securities to the exclusion of the States. Section 77r, however, provides as follows:

"Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

[fols. 84-85] It was clearly the intention of Congress to leave the States free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and, in the absence of such a conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction in this field. The appellants have not pointed out any such conflict and we have been unable to discover any.

On the whole case, we are of opinion to affirm the order of the Commission.

Affirmed.

[fol. 86] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

[Title omitted]

Petition for Appeal to the Supreme Court of the United States, Assignments of Error and Prayer for Reversal

To the Honorable Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia:

I

PETITION FOR APPEAL.

Travelers Health Association, a non-profit Nebraska corporation, and R. E. Pratt, a resident of Nebraska as Treasurer thereof, and in his personal capacity, the Ap-

pellants herein, considering themselves aggrieved by the final judgment of the Supreme Court of Appeals of the [fol. 87] State of Virginia dated and entered on the 10th day of January, 1949, in the above entitled cause affirming the final order of the State Corporation Commission of Virginia rendered January 5, 1948, permanently restraining the Appellants, through the mails or otherwise, from further advertising for sale, offering for sale, and/or selling within the State of Virginia contracts of insurance and/or indemnity until a permit or authorization therefor shall have been issued by the State Corporation Commission of Virginia, present this petition within ninety days after January 10, 1949, as required by Section 2101(c) of the Judicial Code and Judiciary, approved June 25, 1948, effective September 1, 1948 (Title 28, U. S. C., Section 2101(c)), and respectfully show:

(1) That the said final judgment was rendered by the highest court of the state in which a decision could be had, in which there was drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity;

(2) That the said statute, the validity of which was so drawn in question, was an Act of the General Assembly of Virginia, approved March 23, 1932 (Acts of the General Assembly of Virginia, 1932, Chapter 236, page 434; Section 3848(52) of Michie's 1942 Code of Virginia), which is an amendment and re-enactment of Section 6 of what is generally known as the Virginia Blue Sky or Virginia Securities Law and herein called "Virginia Securities [fol. 88] Law" (Acts of the General Assembly of the State of Virginia, 1928, Chapter 529, page 1373; Sections 3848 (47) *et seq.* of Michie's 1942 Code of Virginia).

(3) That said Section 6 of the Virginia Securities Law authorizes the issue of cease and desist orders in the nature of permanent injunctions by the State Corporation Commission of Virginia against all individuals, corporations and associations, including those not domesticated or otherwise present, residing or doing business in the State, that are found to be violating the provisions of said Virginia Securities Law upon hearings held pursuant to orders of the State Corporation Commission, issued upon its own motion or at the instance of any resident of this State, to

show cause why such cease and desist orders should not issue against such persons. Section 6 further provides that jurisdiction may be had over such non-resident persons, and notice of the hearing given them through the medium of at least 10 days' notice by registered mail to their out-of-state addresses or by publication of a notice in the manner prescribed in the statute;

(4) That the grounds of the asserted invalidity of said statute here are that, as applied to the Appellants in this case, it was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States and Clause 7, Section 8, Article I, of said Constitution, granting to Congress the exclusive control of the United States Mails;

[fol. 89] (5) That therefore the Appellants respectfully show the Court that this case is one in which, under Section 1257(2) of the Judicial Code and Judiciary, approved June 25, 1948, effective September 1, 1948 (Title 28, U. S. C., Section 1257(2)), a review may be had in the Supreme Court of the United States by appeal.

Wherefore, Appellants pray for an allowance of an appeal from the aforesaid final judgment to the Supreme Court of the United States, and upon Appellants giving bond in an amount to be fixed by this Court that the said appeal may operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of the aforesaid restraining order of the State Corporation Commission.

II

Assignment of Error

The appellants assign the following errors in the record and proceedings in said case:

(1) That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the final order of the State Corporation Commission rendered January 5, 1948, and thereby sustaining the validity of Section 6 of said Virginia Securities Law (Section 3848 (52), Michie's 1942 Code of Virginia).

(2) That the Supreme Court of Appeals of Virginia erred in failing to hold that the issuance of a cease and desist

order in the nature of a permanent injunction against Ap- [fol. 90] pellants, under and in pursuance of Section 6 of the said Virginia Securities Law, deprived the Appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of Section 6 of said Virginia Securities Law against Appellants constituted illegal and unlawful interference with the use of the United States Mails, the exclusive control and regulation of which is delegated exclusively to the Congress by Clause 7, Section 8, Article I, of the Constitution of the United States.

III

Prayer for Reversal

For which errors the Appellants, Travelers Health Association, and R. E. Pratt, as Treasurer thereof, and in his personal capacity, pray that the said judgment of the Supreme Court of Appeals of Virginia dated and entered the 10th day of January, 1949, in the above entitled cause, be reviewed and reversed, and that judgment be rendered in favor of the Appellants and for costs;

Appellants further pray that the Clerk of the Supreme Court of Appeals of the State of Virginia be directed to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law.

[fols. 91-92] Appellant, Travelers Health Association, herewith tenders a cost and supersedeas bond in such sum as the Court may require.

This the 7th day of April, 1949.

Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, Appellants, by Thomas B. Gay, H. Merrill Pasco, Counsel for Appellants.

Filed April 7, 1949. M. B. Watts, Clerk.

[fol. 93] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

The Appellants in this cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Appeals of the State of Virginia on the 10th day of January, 1949, and from each and every part thereof and having prayed and filed its petition for an appeal, assignments of error and prayer for reversal, pursuant to the statute and to the Rules of the Supreme Court of the United States in such case made and provided, it is hereby

Ordered that the appeal be, and the same is hereby, al-[fols. 94-95] lowed to the Supreme Court of the United States from the Supreme Court of Appeals of the State of Virginia in the above entitled cause, as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of Appeals of the State of Virginia shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit same, together with all papers filed, in accordance with the rules of the Supreme Court of the United States, to the Supreme Court of the United States, so that he shall have the same in said Court within not exceeding forty (40) days from this date and the date of signing the citation.

The Appellant, Travelers Health Association, having tendered and filed a cost and supersedeas bond with good and sufficient surety, conditioned as required by law in such cases made and provided, and in the sum of $1,000.00, said bond is accordingly hereby approved.

Edward W. Hudgins, Chief Justice, Supreme Court of Appeals of the State of Virginia.

April 8th, 1949.

[fols. 96-98] Citation in usual form showing service on J. Lindsay Almond, Jr., omitted in printing.

[fols. 99-103] Cost and supersedeas bond on appeal for 1,000.00 approved April 8, 1949, omitted in printing.

[fol. 104] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of Appeals of Virginia:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of the record the following, and no other papers and exhibits, to-wit:

(1) The petition of Travelers Health Association and R. E. Pratt, as Treasurer thereof and in his personal capacity, to the Supreme Court of Appeals of Virginia from the order of the State Corporation Commission of January 5, 1948, including Statement of the Facts, Assignments of Error and Statement of Position.

[fol. 105] (2) The order of the State Corporation Commission of Virginia dated May 5, 1947.

(3) The notice of special appearance before the State Corporation Commission of Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity.

(4) The exhibits introduced in evidence, including all statements of counsel before the State Corporation Commission on September 18, 1947.

(5) The stipulation of facts dated September 2, 1947.

(6) The final order of the State Corporation Commission in the form of a Cease and Desist order in the nature of a permanent injunction under Section 6 of the Virginia Securities Law dated January 5, 1948.

(7) The opinion of the State Corporation Commission by Downs, Commissioner.

(8) The opinion and judgment of the Supreme Court of Appeals of the State of Virginia dated and filed January 10, 1949.

(9) The petition for an appeal from the Supreme Court of Appeals of Virginia to the United States Supreme Court.

(10) Assignments of error and prayer for reversal.

(11) The order of the Chief Justice of the Supreme Court of Appeals of Virginia allowing the appeal and fixing and [fol. 106] approving the cost and supersedeas bond.

(12) The citation.

(13) The cost and supersedeas bond.

(14) All papers filed by the parties under the requirement and authority of Rule 12 of the Rules of the Supreme Court of the United States.

(15) This praecipe with proof of service.

(16) Your certificate certifying the correctness of the transcript.

Said transcript to be prepared as required by law and the Rules of the Supreme Court of Appeals of Virginia, and the Rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States, at Washington, on or before the 18th day of May, 1949.

Dated this 8th day of April, 1949.

Thomas B. Gay, H. Merrill Pasco, Attorneys for the Appellants.

Service of the above praecipe accepted and acknowledged this 11th day of April, 1949.

J. Lindsay Almond, Jr.

[fols. 107-108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF, AS REQUIRED BY RULE 13, PARAGRAPH 9.—Filed May 19, 1949

Comes now the Appellants in the above entitled cause and state that the points upon which they intend to rely in this Court are as follows:

Point 1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the final order of the State Corporation Commission rendered January 5, 1948, and therein sustaining the validity of Section 6 of the Virginia Securities Law (Section 3848(52), Michie's 1942 Code of Virginia).

Point 2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the issuance of a cease and desist order in the nature of a permanent injunction against [fol. 110] Appellants, under and in pursuance of Section 6 of the said Virginia Securities Law, deprived the Appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Point 3. That the Supreme Court of Appeals of Virginia erred in failing to hold that the enforcement of Section 6 of said Virginia Securities Law against Appellants constituted illegal and unlawful interference with the use of the United States Mails, the exclusive control and regulation of which is delegated exclusively to the Congress by Clause 7, Section 8, Article I, of the Constitution of the United States.

Appellants respectfully represent that the whole of the record, as filed, is necessary for the consideration of the above mentioned points.

Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, Appellants. By Thomas B. Gay, H. Merrill Pasco, Counsel for Appellants.

Service of the foregoing statement of the points to be relied on by Appellants and of the parts of the record it [fol. 111] thinks necessary for the consideration thereof pursuant to Rule 13, paragraph 9, is hereby accepted and

the receipt of a copy thereof is hereby acknowledged for and on behalf of the Commonwealth of Virginia, Appellee, this 12th day of May, 1949.

J. Lindsay Almond, Jr., Attorney General.

[fol. 112] [File endorsement omitted]

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 13, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary docket.

Endorsed on Cover: File No. 53,804. Virginia Supreme Court of Appeals, Term No. 76. Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, Appellants, vs. Commonwealth of Virginia, at the relation of State Corporation Commission. Filed May 19, 1949. Term No. 76 O. T. 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION, AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,
Appellants,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

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1003 Electric Building,
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Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 802

TRAVELERS HEALTH ASSOCIATION, AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,

vs. *Appellants,*

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF STATE CORPORATION COMMISSION,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

Travelers Health Association, and R. E. Pratt, as Treasurer thereof, and in his personal capacity, Appellants, applicants herein for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of the State of Virginia, dated and entered on the 10th day of January, 1949, in accordance with the requirements of paragraph 1 of Rule 12 of the Rules of the Supreme

Court of the United States, herewith present this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

I

Statutory Provision Sustaining the Jurisdiction of the Supreme Court of the United States

This is an appeal under Section 1257(2) of the Judicial Code and Judiciary, approved June 25, 1948, effective September 1, 1948 (Title 28, U. S. C., Sec. 1257(2)) from a final judgment of the Supreme Court of Appeals of Virginia dated and entered on the 10th day of January, 1949, which is a final judgment rendered in the highest court of the State of Virginia in which a decision could be had, where is drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II

State Statute the Validity of Which Is Involved

The statute of the State of Virginia, the validity of which is involved, is an Act of the General Assembly of Virginia, approved March 23, 1932 (Acts of the General Assembly of Virginia, 1932, Chapter 236, page 434; Section 3848 (52) of Michie's 1942 Code of Virginia), which is an amendment and reenactment of Section 6 of what is generally known as the Virginia Blue Sky or Virginia Securities Law and hereinafter referred to as the "Virginia Securities Law" (Acts of the General Assembly of Virginia, 1928, Chap. 529, page 1373; Sections 3848(47) *et seq.* of Michie's 1942 Code of Virginia).

Section 6 in its entirety is pertinent to the questions here raised and is appended hereto at page 25 marked "Appendix A." It permits the State Corporation Commission of Virginia to enjoin anyone from offering for sale or otherwise promoting the sale in Virginia of any unqualified securities and provides that where personal service within the State cannot be made "because the offering is by advertisement and/or solicitation through . . . mail . . . from beyond the limits of the State" service of process may be made by registered mail or by publication.

Closely related to the above section, the validity of which is directly involved, are (a) Section 9 (Section 3848(55) of Michie's 1942 Code of Virginia) which requires every person desiring to engage in the selling or offering for sale in Virginia of securities, including the type issued by Travelers Health Association, to obtain a permit so to do, (b) Section 15 (Section 3848(61) of Michie's 1942 Code), which provides that any person violating the Virginia Securities Law or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by fine or confinement in jail or both, and (c) Section 17 (Section 3848(63) of Michie's 1942 Code) which authorizes the State Corporation Commission of Virginia to impose a fine of not exceeding $500 for failure or refusal to comply with any lawful order made under the Virginia Securities Law.

III

Dates of Judgment and Presentation of Application for Appeal

The judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was dated, filed and entered on the 10th day of January, 1949. The petition for appeal was presented to the Honorable Edward W. Hudgins, Chief

Justice of the Supreme Court of Appeals of Virginia, on April 8, 1949, and was by him allowed the same date.

IV

Nature of the Case and Manner in Which Federal Questions Were Raised

On May 5, 1947, the State Corporation Commission of Virginia, based upon information received from the files of the Commission, issued an order against the Appellants, Travelers Health Association, a non-profit Nebraska corporation, and R. E. Pratt, a resident of Nebraska, as Treasurer thereof, and in his personal capacity, pursuant to Section 6 of the Virginia Securities Law, charging Appellants with advertising for sale, offering for sale and selling "within the State of Virginia" securities in the form of contracts of insurance and/or indemnity in Travelers Health Association without having obtained the necessary authorization required by the Virginia Securities Law and ordering the Appellants to appear before the State Corporation Commission, at its courtroom in Richmond, Virginia, on May 19, 1947, to show cause why a cease and desist order in the nature of a *permanent injunction* should not be issued against them, restraining them from advertising for sale, offering for sale and selling the securities in question in Virginia, by *interstate mail* or *otherwise*, until a permit or authorization shall have been issued by the State Corporation Commission according to law.

Since the Appellants were not residents of and were not located in the State of Virginia, and were not licensed to transact business therein, and there being no way therefore to obtain direct service of process on them, the State Corporation Commission, pursuant to the provisions of Section 6 of the Virginia Securities Law, attempted to obtain

jurisdiction over the Appellants for the purpose of the aforesaid hearing by forwarding attested copies of the order of May 5, 1947, by registered mail to them at their address in Omaha, Nebraska.

On May 13, 1947, the Appellants, by counsel, entered a special appearance before the State Corporation Commission for the sole purpose of objecting to the alleged jurisdiction of the Commonwealth of Virginia and its State Corporation Commission, and moving the Commission to set aside and quash the service of process alleged to have been had upon Appellants. The grounds for the motion to quash, as stated orally at the adjourned hearing held September 18, 1947, and in the memorandum in support of Appellants' position filed at said hearing were (a) that the proceeding was one *in personam* and the alleged service of process was therefore void, (b) Section 6 of the Virginia Securities Law was in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States and therefore void if interpreted so as to permit substituted service of process on non-residents not domesticated or otherwise present or doing business in the State in such a proceeding *in personam*, and (c) Section 6 of the Virginia Securities Law was in contravention of Clause 7, Section 8, Article I, of the Constitution of the United States if interpreted so as to permit the State of Virginia to regulate the lawful use of the United States mails by non-residents not domesticated or otherwise present or doing business in the State. It thus appears that the Federal questions sought to be reviewed on this appeal were clearly and explicitly raised at the very outset of this case.

The cause came on for hearing on the Appellants' motion to quash on September 18, 1947, at which time the issues

were argued by counsel upon the following Stipulation of Facts and upon exhibits introduced in evidence:

"1. Travelers Health Association is a non-profit membership association incorporated for the past forty-two years under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

"2. Travelers Health Association has not now nor has it ever had any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia.

"3. Each of the members of said Association receives by mail from Omaha, Nebraska, when accepted as a member, a membership certificate providing for certain health insurance benefits and requiring the member, from time to time, to forward by mail to Omaha, Nebraska, the actual cost of such protection through the payment of assessments as levied.

"4. Every application for membership is received and acted upon by the Association in Omaha. Every applicant regardless of his place of residence, is elected to membership in the offices of the Association in Omaha. All assessments to cover insurance costs and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha and all insurance benefits are paid from the home office there.

"5. All notices to members are issued from the home office in Omaha, Nebraska, addressed to the members at their respective places of residence throughout the United States, and are then deposited in the United States Post Office in the City of Omaha for transmission through the United States mails to such members.

"6. New members are usually obtained through recommendations of existing members who submit to

the Association at its home office in Omaha the names of friends and acquaintances believed to be able to qualify for membership.

"7. The Association at Omaha then writes to each such person, wherever he may reside, enclosing an application blank and suggesting that he apply for membership forthwith in order to secure the advantages of membership, which include health insurance protection and claim payments when ill. All such letters are transmitted by mail from the United States Post Office in Omaha.

"8. If upon receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank wherever he may reside and sends it by mail or delivers it personally to the home office of the Association in Omaha, where it is received and acted upon.

"9. Since beginning business, Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia in the manner indicated above. During such periods it has caused many claims to be investigated. Payment of claims has been made by mail from the home office in Omaha. The Association now has approximately eight hundred members (certificates in force) in Virginia.

"10. The only notice received by the respondents of this proceeding was the receipt on May 9, 1947, by registered mail of a copy of the proceeding as instituted, known as Case No. 8816, dated May 5, 1947.

"11. R. E. Pratt resides in Omaha, Nebraska."

On January 5, 1948, the State Corporation Commission overruled Appellants' motion to quash the service of process and entered a final order in the nature of a *permanent injunction*, pursuant to the provisions of Section 6 of the Virginia Securities Law, restraining Appellants from further advertising for sale, offering for sale and or selling in Virginia, *through the medium of interstate mail* or *other-*

wise, the securities in question until permit or authorization was granted by the State Corporation Commission and the aforesaid order duly vacated. Violations of the said *permanent injunction* are punishable by *fines* and/or *imprisonment* under Sections 15 and 17 of the Virginia Securities Law (Sec. 3848(61) and 3848(63) of Michie's 1942 Code of Virginia).

Under Section 3734 of Michie's 1942 Code of Virginia, Appellants were entitled to an appeal to the Supreme Court of Appeals of Virginia as a matter of right from the aforesaid final order of the State Corporation Commission and such an appeal and *supersedeas* was granted by the Supreme Court of Appeals of Virginia by order dated May 17, 1948. The principal assignments of error relied upon were that the Commission had erred in failing to hold that Section 6 of the Virginia Securities Law, as applied to the Appellants, denied them due process of law and constituted an unlawful attempt to regulate the lawful use of the United States mails, exclusive control of which was delegated to the Congress by Clause 7, Section 8, Article I, of the Constitution. Thus the Federal questions sought to be reviewed on this appeal were squarely and explicitly raised in the Supreme Court of Appeals of Virginia by Appellants' assignments of error to the action of the State Corporation Commission.[1]

Each of these assignments of error was relied upon by Appellants before the Supreme Court of Appeals of Virginia, both in their briefs and in oral argument. That Court, in its opinion and final judgment dated and entered on January 10, 1949, and here appealed from, affirmed the order of the State Corporation Commission and expressly

[1] For the full statement of the Assignments of Error taken by Appellants in the Supreme Court of Appeals of Virginia, to the action of the State Corporation Commission, see printed Record of the Supreme Court of Appeals of Virginia, pages 3 and 4.

sustained the validity of Section 6 of the Virginia Securities Law as applied to the Appellants herein.[2]

V.

The Federal Questions Involved Are Substantial

The ultimate Federal questions presented to the State Corporation Commission of Virginia and in turn to the Supreme Court of Appeals of Virginia, and also presented on this appeal, are: (A) The validity under the Fourteenth Amendment to the Constitution of the United States of a state statute which authorizes the issue of *permanent injunctions* against all individuals, corporations and associations, including those which have never been domesticated or otherwise present, residing or doing business in the State, that are deemed to be violating the provisions of the statute, and which authorizes that jurisdiction may be had over those which have never been domesticated or otherwise present, residing or doing business in the State, upon service of process by registered mail to their out-of-state addresses, or by publication in the manner prescribed in the statute; and (B) the validity under Clause 7, Section 8, Article I, of the Constitution of the United States of a state statute which authorizes a state to deny full and free use of the United States Mails to individuals, corporations and associations not domesticated or otherwise present or doing business in Virginia.

(A) In sustaining the validity of Section 6 of the Virginia Securities Law on the ground that it does not contravene

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[2] Pursuant to the provisions of Paragraph 1 of Rule 12 of the Rules of this Court, Appellants append thereto at page 29, marked "Appendix B," the opinion rendered below in this case by the Supreme Court of Appeals of Virginia, and reference is here made to pages 31, 40, 42 and 43, where the Supreme Court of Appeals of Virginia stated the Federal questions raised and expressly and affirmatively ruled in favor of the validity of the statute in question.

the due process clause of the Fourteenth Amendment, the Supreme Court of Appeals of Virginia decided an important Federal question in a way which conflicts with applicable decisions of this Court defining the limitations of due process in cases where state courts seek to obtain jurisdiction over individuals, corporations or associations not domesticated or otherwise present, residing or doing business in the state. See:

Pennoyer v. *Neff*, 95 U. S. 714 (1887);
Old Wayne Mutual Life Assn. v. *McDonough*, 204 U. S. 8 (1907);
Philadelphia & Reading Rwy. v. *McKibben*, 243 U. S. 264 (1907);
Peoples Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79 (1918);
Rosenberg v. *Curtis-Brown Company*, 260 U. S. 516, (1923); and
Minnesota Commercial Men's Assn. v. *Benn*, 261 U. S. 140 (1923).

In holding that Section 6 of the Virginia Securities Law, as applied to the Appellants, does not contravene the due process clause of the Federal Constitution, the Virginia Supreme Court of Appeals relied principally upon language taken from the opinion in *International Shoe Company* v. *Washington*, 326 U. S. 310 (1945). That case involved a determination of whether or not *mere continuous solicitation, by agents physically present within a state,* of orders to be accepted and filled from without the state by an *undomesticated foreign corporation* constituted doing business in the state to an extent sufficient to subject the foreign corporation to the jurisdiction of the state for purposes of collecting assessment of an unemployment compensation tax. Process was *served personally on a resident agent* and *also* by mailing notice of the proceeding to the defend-

ant by registered mail at its home office outside the state. The extent of the company's activities in the state is described by the court as follows:

> "Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. *These salesmen resided in Washington; their principal activities were confined to that state;* and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one show of a pair, which they display to prospective purchasers. *On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose.* The cost of such rentals is reimbursed by appellant.
>
> "The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f. o. b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections." (Italics supplied) (pp. 313 and 314)

The *International Shoe Company* case stands only for the proposition that mere continuous solicitation by agents physically present within a state is sufficient to permit the state to assume jurisdiction over their principal, an

undomesticated foreign corporation, by service of process in the manner described above without violating the due process requirements of the Fourteenth Amendment. The court, in its opinion, defined the requirements of due process in such cases where the defendant is not itself present within the state to be such "minimum contacts" with the state in the form of activities within the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" In the case which is the subject of this appeal *there has been no solicitation by agents personally present in Virginia* and *the only service of process was by registered mail to the Appellants in Nebraska,* where, as will appear more particularly from the above quoted Stipulation of Facts,[3] all of the activities of the Appellants here complained take place. It is there that all mailing is done, all applications accepted, all contracts made and all claims paid.

The Virginia Supreme Court of Appeals in the present case found that the old Virginia members solicited new memberships in Virginia and that such activity, supplemented by three other activities of the Association referred to below, constituted such "minimum contacts" as are necessary to fulfill the due process requirements defined by the Court in the *International Shoe Company* case. It is submitted that the record in this case does not support this finding of the Virginia court. See paragraphs 6 and 7 of the Stipulation of Facts which state that names of prospects are sent by old members to Appellants in Omaha and the letters of solicitation sent for there. Even assuming the Virginia court to be correct in finding that old members solicited new members in Virginia, to construe such activity of old members as an activity of Appellants is clearly contrary to the decision of this Court in *Minnesota Com-*

[3] Page 6, *supra*.

mercial Men's Assn. v. *Benn, supra,* where new members of an association identical for all practical purposes with the Appellant Association here, were solicited by old members residing in the state who, as in the present case, had no authority to obligate the Association. The Court expressed its decision in this respect as follows:

> "Considering what this Court held in Green *v.* Chicago, Burlington & Quincy Ry. Co., 205 U. S. 531; Philadelphia & Reading Ry. Co. *v.* McKibben, 243 U. S. 264; Peoples Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79; and Rosenberg Bros. & Co. *v.* Curtis-Brown Co., 260 U. S. 516, *we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members.* That is not enough 'to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.' Peoples Tobacco Co. *v.* American Tobacco Co., *supra,* 87.
>
> "It also seems sufficiently clear from Allgeyer *v.* Louisiana, 165 U. S. 578; Hunter *v.* Mutual Reserve Life Insurance Co., supra and Provident Savings Life Assurance Society *v.* Kentucky, supra, that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. See also Pempleton *v.* Illinois Commercial Men's Association, 289 Ill. 99.
>
> "We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment." (Italics supplied) (p. 145).

See also, *Rausch* v. *Commercial Travelers Mutual Accident Association,* 38 Fed. (2d) 766 (C. C. A. 8th, 1930) (cert.

den. 281 U. S. 763); *Sasnett* v. *Iowa State Traveling Men's Ass'n*, 90 F (2d) 514 (C. C. A. 8th, 1937), and *Oliver* v. *Iowa State Traveling Men's Ass'n*, 76 F. (2d) 963 (C. C. A. 8th, 1935).

The other activities of the Appellants which, together with the alleged solicitation by old members, the Virginia Court held to constitute the "minimum contacts" with Virginia, are (a) investigation of claims by Appellants in Virginia, (b) of Virginia claims discharged in Virginia and (c) contracts of insurance consummated in Virginia.

Appellants recognize the well settled rule that the decision of a state court upon a question of fact cannot generally be made the subject of inquiry on appeal to this Court. Appellants, however, assert that the Virginia Court's findings and conclusions concerning the above activities, which result in depriving them of their rights under the Fourteenth Amendment, are either without evidence to support them in the record or represent a combination of conclusions of law and finding of fact and therefore justify this Court in making these findings and conclusions the subject of inquiry. Such exceptions to the above rule were recognized by this Court in *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389 (1924) in the following language:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. * * * To this general rule there are two equally well settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' Northern Pacific Ry. Co. *v.* North Dakota, 236 U. S. 585, 593, and cases cited. See also Truax *v.* Corrigan, 257 U. S. 312, 324-325."

It is submitted that a reasonable interpretation of the Stipulation of Facts and the exhibits on which this case was heard does not warrant the conclusion that the Appellants either undertook to investigate claims by the use of persons physically present in Virginia who were agents or employees of the Association or otherwise. The record is silent both as to the place and method of such investigations. It was sheer speculation for the Virginia Court to attempt to find, as it did, that such investigations constituted "an additional Virginia activity." Likewise, to hold, as it did, that payment of claims to Virginia members in Virginia by use of interstate mail constitutes a legal activity in Virginia is not only contrary to a fair and reasonable interpretation of paragraph 9 of the Stipulation of Facts,[4] but also to the decisions of this Court. See *Minnesota Commercial Men's Ass'n* v. *Benn, supra; Hunter* v. *Mutual Life Insurance Co.*, 218 U. S. 573 (1910). See also, *Kasel* v. *Milwaukee Employees Pension Ass'n*, 221 N. W. 21 (Minn. 1928). Also the Virginia Court was in error, as a matter of law, in finding that the contracts of insurance were consummated in Virginia because they were issued in Omaha "subject to approval of applicant." Such a proviso does not constitute a condition precedent to the effectiveness of the contracts issued by the Association as these contracts became effective, and the insurance was in force, immediately upon acceptance of the application for membership after its receipt in Omaha. See paragraph 8 of the Stipulation of Facts.[4] The subsequent act of the member in exercising his right to cancel the insurance within the ten day period permitted by the contract simply is not an activity of the Appellants.

One of the Federal questions here presented, therefore, is whether, on the record in this case, there have been suffi-

[4] Page 7, *supra*.

cient "minimum contacts" by Appellants with the State of Virginia to fulfill the requirements of due process in the issue of a *permanent prohibitory injunction* upon substituted service of process, the decretal paragraph of which is as follows:

> "It is adjudged, ordered and decreed, That Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, be, and they hereby are, *directed to cease and desist, and that they be, and they hereby are, enjoined and restrained,* until further order of the Commission to the contrary, personally, and/or through any employee, agent, or representative, and/or through medium of any advertisement from within or from without the State, and/or through the mails or otherwise, by intra- or inter-state communication, from offering, advertising, promoting, selling, assisting or participating in or acting in furtherance of, the offer, advertisement, sale and/or promotion in Virginia of contracts of insurance and/or indemnity, unless and until otherwise ordered; or unless and until permit or authorization by the State Corporation Commission shall have been issued according to law, or unless and until qualification shall have been effected under the Insurance Laws, and until this order to cease and desist shall have been duly vacated according to law; * * *"

The decree which is the subject of the appeal is clearly *in personam* in nature and, under the related provisions of the Virginia Securities Law, violations of the injunction are punishable by fines and/or imprisonment. The Stipulation of Fact establishes that the Appellant Association has never had an office nor an agent of any kind, nor any other representative, bank account or property of any sort in Virginia, and that the individual Appellant has not been present or done business in this State.

It is respectfully submitted that in holding that Appellants are subject to the jurisdiction of the State of Vir-

ginia solely on the sending of notices of the proceedings here involved by registered mail to their Nebraska address, the Virginia Court has done violence to the established principles of due process under the Fourteenth Amendment, as construed by this Court, thereby raising a substantial Federal question, which is of vital importance to the Appellants and the large number of non-profit health and accident insurance associations and their members located throughout the United States.

The Virginia Court in upholding the constitutionality of Section 6 of the Virginia Securities Law relied generally upon the decision in *Hall* v. *Geiger Jones Company*, 242 U. S. 539 (1907) for the proposition that such regulatory laws as the Virginia Securities Law do not conflict with or violate any provisions of the Federal Constitution. The *Geiger Jones* case, and the cases of *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917), and *Merrick* v. *Halsey & Co.*, 242 U. S. 568 (1917), which were decided together, and are generally referred to as the "Blue Sky Cases", involved the constitutionality of the Blue Sky Laws of Ohio, South Dakota and Michigan, respectively. These cases upheld the constitutionality of these laws on the ground that they represented lawful exercise of the police power of the states. *No question of jurisdiction or of validity of service or process was raised in any of the cases.* None of the Blue Sky laws in question contained such a provision as is found in Section 6 of the Virginia Securities Law authorizing service of process by registered mail outside the State. In the first two cases the defendants concededly were present in the respective states doing business there. In the *Merrick* case the out-of-state security brokers were the plaintiffs who sought to enjoin the enforcement of the law by the officials of the State of Michigan. It is true that one of the plaintiffs was a partnership that sold securities in Michigan only by use of the interstate mails, but it

is apparent from the opinion that it did not raise the jurisdictional issue.

So far as we have been able to ascertain, the constitutionality of such provisions as are contained in Section 6 of the Virginia Securities Law has never been decided by this Court; and the manner of service of process on foreign corporations and non-resident individuals authorized by that statute goes far beyond anything ever approved by this Court as within the requirements of the Fourteenth Amendment.

In approving the constitutionality of the provisions of Section 6 of the Virginia Securities Law, the Virginia Court has not only done violence to the controlling decisions of this Court with respect to the requirements of due process in the service of process on non-resident individuals and foreign undomesticated corporations, but it has also ignored the controlling decisions of this Court defining the limitations within which a state may lawfully control the making of contracts beyond its borders. See:

Allgeyer v. *Louisiana*, 165 U. S. 578 (1897);
New York Life Ins. Co. v. *Head*, 234 U. S. 149 (1914);
New York Life Ins. Co. v. *Dodge*, 246 U. S. 357 (1918);
St. Louis Compress Co. v. *Arkansas*, 260 U. S. 346 (1922)
Minnesota Men's Ass'n v. *Benn*, *supra*;
Aetna Life Ins. Co. v. *Bunken*, 266 U. S. 389 (1924);
Home Insurance Co. v. *Dick*, 281 U. S. 397 (1930);
Hartford Indemnity Co. v. *Delta*, 292 U. S. 143 (1934).

The doctrine of the foregoing cases is succinctly stated in 29 American Jurisprudence (Insurance), Sections 38 and 41, as follows:

> "While the state may regulate the activities of foreign insurance companies within the state, it cannot regulate what they do outside. Notwithstanding

the broad powers which the states enjoy in respect of the conditions which may be imposed on foreign insurance companies seeking to do business within their borders, *statutes which attempt directly or in effect to forbid or penalize the making of contracts of insurance outside the state, to be performed outside the state, on property within the state or on the lives of residents of the state, or to make such contracts a subject or source of taxation, have been quite consistently condemned as in violation of the Fourteenth Amendment to the Constitution of the United States.* A policy loan agreement concluded by a citizen of a certain state with a foreign insurance corporation at its home office cannot, consistent with the guaranty of the Fourteenth Amendment to the Federal Constitution of the freedom of an individual to contract, be brought into subjection to, and thus rendered ineffective by, a statute of the state wherein the citizen resides or the original contract of insurance was entered into. A fortiori, it is clear that neither the continuance of the obligation of an insurance contract in itself nor acts done elsewhere on account of it can be regarded as being within the state's control where there is no actual transaction of business in the state by the insurer. (Italics supplied) (p. 75)

* * * * * * *

"It has been held that a foreign insurance company does not do business in a state when it issues insurance policies to citizens thereof, if the contracts of insurance are made and the policies are issued in another state . . . Likewise, a mutual insurance company is not doing business in a state if it maintains no agents therein, but requires applications for membership to be mailed to its home office in another state, where they are accepted and the contracts written and mailed, and it is immaterial that new members are solicited by old ones residing in the state, who have no authority to obligate the company to any contract. . . . . " (pp. 77-78)

The Virginia Supreme Court of Appeals in support of its decision in this case construed the Virginia Securities Law to be a criminal statute and the proceeding in question thereunder to be *quasi-criminal* in nature, thereby attempting to distinguish such authorities favorable to Appellants' position as *Minnesota Commercial Men's Association* v. *Benn, supra.* Regardless of the classification given the statute by the Virginia Court its application to the Appellants herein raises the issue of whether they are thereby denied their rights guaranteed by the Fourteenth Amendment. Under such circumstances, this Honorable Court is not bound by the interpretation given the statute by the Virginia court. In *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346 (1922) the court recognized this principle in the following language:

> "It also alleged that long before the taxing act was passed the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower Court overruled the demurrer, but the Supreme Court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the Fourteenth Amendment. Judgment was entered for the plaintiff and the case was brought by writ of error to this Court.
>
> "The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court although bound by the construction that the Supreme Court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362. The short question is whether this so-called tax is saved because of the name given to it by the stat-

ute when it has been decided in *Allgeyer* v. *Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the Fourteenth Amendment."

(B) Section 6 of the Virginia Securities Law, as interpreted by the Virginia Supreme Court of Appeals, deprives the Federal Government of its absolute control and regulation of the mails and of the Post Office Department of the United States, which is expressly and exclusively delegated to Congress by Clause 7, Section 8, Article I, of the Constitution of the United States. The order appealed from warns the Appellants that if they deposit a letter of solicitation in the United States Post Office anywhere outside of the State of Virginia and that letter is carried through the United States Mails and under United States protection to and across the borders of Virginia, the State of Virginia will hold Appellants in contempt for violation of the decree. It tells the Appellants in effect that the act of mailing is an act of contempt for which the State of Virginia will exact its punishment. This is believed to be beyond the power of any state in view of the decisions of this Court. In *Badders* v. *United States*, 240 U. S. 391 (1916), the court stated:

> "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. *Ex parte Jackson*, 96 U. S. 727." (p. 393)

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Company*, 96 U. S. 1 (1877), the court considered the exclusive power of Congress to regulate the mails and the effect of state legislation which infringed upon this power. At page 9 it is concluded:

> "As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among

> the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

The same conclusion was subsequently reached in the later case of *In re Rapier*, 143 U. S. 110 (1892):

> "The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. *When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power*, and the grant carried with it the right to exercise all the powers which made that power effective." (Italics supplied) (p. 134)

That the states, themselves, have recognized the exclusive power of Congress to regulate and control the use of the mails is illustrated in *Rose Co.* v. *State*, 133 Ga. 353, 65 S. E. 770 (1909), where the court stated:

> "The establishment of post-offices and regulation of the mails is a matter which has been dealt with by the Federal authorities under their constitutional powers. *Subject to Federal laws and regulations, they are open to all who desire to conduct through them legitimate business transactions.*" (Italics supplied) (pp. 773-774)

It is apparent that the State of Virginia, through its State Corporation Commission, and with the approval of the Virginia Supreme Court of Appeals, has entered a decree pursuant to Section 6 of the Virginia Securities Law which exceeds its power as a state in that it has attempted to regulate the lawful use of the United States Mails. The Supreme Court of the State of Georgia has ably expressed the limits imposed upon a state in the regulation of the United

States Mails in *Rose Co. v. State*, 133 Ga. 353, 65 S. E. 770 (1909):

> "A State can exercise its police power to the limits of its own domain, but *it cannot go beyond and police the citizens of other States*, acting beyond its borders in the conduct of a lawful business, *or prevent their using the mails by posting letters or circulars in such other States in carrying on legitimate business.*" (Italics supplied) (p. 774)

It is respectfully submitted that in view of the foregoing authorities and the language of Section 6 of the Virginia Securities Law and the order of the State Corporation Commission herein, a substantial Federal question is involved.

Summary as to Substantial Federal Questions. It appears from the foregoing (1) that the Supreme Court of Appeals of Virginia, in refusing to hold that Section 6 of the Virginia Securities Law as interpreted and applied by the State Corporation Commission in this case violates the Fourteenth Amendment to the Constitution of the United States, has decided a Federal question of substance not heretofore determined by this Court and in a manner constituting a denial of the right of due process as guaranteed to the Appellants by the Fourteenth Amendment; (2) that the Virginia Court, in refusing to hold Section 6 of the Virginia Securities Law invalid and unenforceable against Appellants because in contravention of the Fourteenth Amendment, has decided a Federal question of substance in a way not in accord with the applicable principles, established by prior decision of this Court, concerning the requirements of due process of law as guaranteed by the Fourteenth Amendment; and (3) that the decision of the state court in sustaining the validity of Section 6 as a proper regulation of the United States Mails is not in accord with

the substantial authority above quoted including the decisions of this Court.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal by virtue of said Section 1257(2) of the Judicial Code and Judiciary, (Title 28 U. S. C. A., Sec. 1257(2), approved June 25, 1948, effective September 1, 1948).

Respectfully submitted,

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APPENDIX A

Acts of the General Assembly of the State of Virginia, 1932

Chapter 236

Chap. 236.—An Act to amend and re-enact section 6 of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain 'securities' herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March 23, 1918, as heretofore amended. (S. B. 335)

Approved March 23, 1932

1. Be it enacted by the general assembly of Virginia, That section six of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain 'securities' herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia, as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March twenty-third, nineteen hundred and eighteen, as heretofore amended, be amended and re-enacted so as to read as follows:

Section 6. The State Corporation Commission shall have jurisdiction at the instance of any resident of this State, upon affidavit by such resident duly sworn to, or of its own motion, and upon such facts and established in such manner, as required in a court of equity, for purposes of an

injunction, after at least five days' notice to the party defendant and an opportunity to be heard, said notice to be accompanied by a statement of the facts and charges upon which action is proposed, to issue a cease and desist order in the nature of a temporary injunction and restraining order in the matter of and against any person, firm, corporation, society, or association, which it appears from the facts is offering for sale, advertising for sale, or otherwise promoting or assisting, participating in or acting in furtherance of the offering, advertising, selling or otherwise promoting any securities or land which should be qualified and which are not, and/or in any case in which it appears that a fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted in connection with the disposition or attempted disposition of securities, or out of State land, to the public, whether the provisions of this act as to qualification or notification apply or not, and even though one or more of the exemptions or exceptions under this act should be applicable, and even though qualification or registration under the provisions of this act has been effected, enjoining and restraining such person, firm, corporation, society or association, from further offering, advertising, selling or promoting, assisting or participating in or acting in furtherance of such offer, advertisement, or sale and if said cease and desist order is issued it shall thereafter proceed as soon as may be after due notice and after a full hearing on the merits to consider and determine whether or not such cease and desist, or restraining order, and injunction shall be dismissed or made permanent, and its action, subject to right of appeal, shall be conclusive in any court in the State in any matter, civil or criminal upon the same state of facts. The proceeding shall be analogous to and in accordance with proceedings in equity for injunctions, except as otherwise specifically provided, and the commission in this connection shall have power and authority to require a bond with surety in accordance with the principles applicable in the courts of equity of this State, and it shall have power and authority to exercise a sound, judicial and equitable discretion in the administration of these and all other provisions of this act with a view to the

accomplishment of that measure of protection to the public contemplated by this act with as little interference with legitimate business as is consistent with the accomplishment of the objects of this legislation.

In any case in which it is made to appear, or the commission has reason to believe from facts before it, that a proceeding should be instituted to determine whether a cease and desist order or injunction should issue in accordance with provisions of this section and service upon the person or persons, firm, corporation, society, association, or any agent or representative cannot be had because the offering is by advertisement and/or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State, or the person or persons who appear to have personally violated the law within the limits of the State have left the jurisdiction of the State temporarily or permanently, or the original and at least one alias process have been returned not found, jurisdiction may be obtained through the medium of at least ten days' notice instead of five by registered mail, return receipt demanded, to the address or addresses of such person or persons, firms, corporation, society or association insofar as such address or addresses shall be known or shall be available or by publication of notice in a newspaper published in the city of Richmond of general circulation in the State, beginning at least ten days prior to the date set for hearing, and in case of nonappearance in response to such notice, or in case of special appearance, and after full hearing upon the merits, the commission may issue a cease and desist order, in the nature of a temporary injunction, and/or a permanent injunction, in accordance with the preceding provisions of this section where service is had or general appearance is made, and forward by registered mail, return receipt demanded, attested copies of such order to the same addresses or such later addresses as may become known and give such other publicity as it may see fit, and in case no addresses were known or shall have become known such publicity as the commission may see fit shall be given to such order, including notice in either case to the public through the press or otherwise as the commission may, in

its discretion, determine to be advisable for the reasonable information and protection of the public.

The provisions of this section, as amended, are subject to the following provisos: Nothing herein shall be construed as being applicable, as an offeror, solicitor, or advertiser of any securities or out of the State land to the publisher of any newspaper or periodical admitted to second class mailing privileges under the United States postal laws except and until the notice provided for in section two hereof shall have been given by the commission, and further, nothing herein shall be construed, so as to, in any way, impair, or infringe upon the right of any citizen or resident, natural or corporate, or person or corporation temporarily within the State of Virginia to offer, of his, her, or its own initiative, to subscribe for, order, or buy from any nonresident person, firm, corporation, or association, any security or out of the State land which any such citizen, resident or temporary sojourner may desire to subscribe for, order or buy.

Any order that may be entered as the basis of the institution of a proceeding under this section and the issuing of the at least five or ten days' notice, as the case may be, in the discretion of the commission may be kept on the secret docket and not made public until after the preliminary or final hearing, as the commission may determine.

APPENDIX B

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

TRAVELERS HEALTH ASSOCIATION, ET AL.

v.

COMMONWEALTH OF VIRGINIA, EX REL.

Opinion by Justice Abram P. Staples, Richmond, Va., January 10, 1949

Appeal from an Order of the State Corporation Commission

This is an appeal from a cease and desist order entered by the State Corporation Commission on May 3, 1948. The order enjoined and restrained the appellants from offering, advertising, promoting, or selling certain membership certificates or contracts of indemnity or insurance in Virginia, until a permit or authorization so to do has been secured from the Commission as required by the Virginia Securities Act. (Chapter 529 of the Acts of Assembly, 1928, as amended, generally known as the Blue Sky Law. See Michie's 1942 Code of Virginia, sections 3848(47) to 3848(66) inc.).

Section 9 of the act requires every person, association, or corporation, desiring to engage in the selling or offering for sale of securities of this type in Virginia to apply for a permit so to do. Certain conditions must be complied with before a permit can be granted. Irrevocable consent must be filed that action or suit may be commenced against the permittee by the service of process on the Secretary of the Commonwealth, who, in turn, is required to transmit same by mail to the permittee. The applicant is also required to provide detailed information with reference to the solvency of the issuer of the securities and with respect to various other matters relating to the propriety of permitting their sale. The Commission is authorized to conduct such investigations as it may deem appropriate, and also see to the proper application of the proceeds from the sales of the securities.

There are numerous other provisions, but the foregoing are sufficient for our purposes. The appellants do not deny that their membership contracts constitute "securities" within the meaning of the law, or that they are lawfully and properly so classified. Nor do they claim to have applied for or secured the required permit to sell them in Virginia.

Section 15 of the act (Michie's Code, section 3848(61)) provides that any person violating the act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a fine or confinement in jail, or both. Proceedings to enforce the penalties of such violations must be instituted by indictment or information in the appropriate courts of record of the State.

Section 6 of the act (Michie's Code, section 3848(52)) authorizes the State Corporation Commission, upon its own motion, or upon complaint of any resident of the State of violation of the act, to issue a cease and desist order in the nature of a temporary injunction and restraining order against further violations, after at least ten days notice, by registered mail to persons, corporations, or associations upon whom personal service cannot be had because of absence from the State. Signed receipt of the registered notice is required to be returned by the postal authorities.

Section 17 authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the act.

Pursuant to section 6, *supra*, this proceeding against the appellants was instituted by order of the Commission on May 5, 1947. They were charged with offering for sale and selling the securities in question without having procured the necessary permit or authorization and in contravention of the provisions of the Virginia Securities Act. Notices of the proceeding were sent to the appellants by registered mail, and the Post Office registry receipts, filed as exhibits, showed the delivery of same. The notice informed the appellants that at the time indicated they would be given an opportunity to be heard upon whether a cease and desist order would be entered against them.

The appellants appeared specially by their counsel "for the sole purpose of objecting to the alleged jurisdiction of the Commonwealth of Virginia and of its State Corporation Commission, and of moving to set aside and quash service of summons alleged to have been made upon said defendants, and for no other purpose." They challenged the jurisdiction of the State and of the State Corporation Commission upon two broad general grounds; first, that the appellants have conducted no business activities in Virginia, but have transacted their entire business outside the State through the mails; and, second, that, the order of the Commission being in its nature *in personam*, service of notice outside the State by registered mail is not sufficient to confer jurisdiction upon the Commission to take any action with respect to the appellants. The case was heard upon a stipulation of certain facts, and also upon exhibits introduced in evidence.

After hearing the Commission entered the order complained of. It recited the finding by the Commission that the appellants had been engaging in the business of selling their securities in Virginia without complying with the Virginia Securities Act and enjoined them from continuing such activities without such compliance.

It is settled beyond controversy, and not disputed by the appellants, that the regulation of the promotion and sale of securities is a proper exercise of the police power of the States. *Virginia Brewing Co.* v. *Webber*, 167 Va. 67, 187 S. E. 447; *Watters & Martin* v. *Homes Corp.*, 136 Va. 114, 116 S. E. 366. The purpose of laws regulating such promotions and sales is to protect the public against the imposition of fraudulent or unsubstantial schemes or projects, or from being misled into the purchase of securities based upon them. Such statutes do not conflict with or violate any provisions of the Federal Constitution. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, Ann. Cas. 1917C, 643. Therefore, our first inquiry is directed to whether the activities of the appellants in the Commonwealth of Virginia have been such as to subject them to the State's regulatory power.

It appears from the stipulation of facts that the appellant, Travelers Health Association, is a nonprofit member-

ship association incorporated under the laws of Nebraska, with its home office in Omaha. Letters and other exhibits filed in the case show that the appellant, R. E. Pratt, is a resident of Omaha, is treasurer of said association, and conducts its correspondence soliciting new membership contracts. The association has not now nor has it ever had any office, officer, or agent, or any bank account or property located in Virginia. At the time of the hearing it had in force in Virginia approximately eight hundred membership certificates which provided health insurance protection in the form of sickness benefit payments. It also admitted that it has caused many claims asserted by its Virginia members to be investigated in this State. The customary method of soliciting new memberships has been for the Virginia members of the association to recommend to it persons who they believe are likely prospects. The association then writes these persons inviting them to make application for membership. All such letters are transmitted by mail from the United States Post Office in Omaha. If upon the receipt of this letter the proposed applicant is so disposed, he fills out the application blank and sends it by mail to the home office of the association in Omaha, where it is received and acted upon.

The exhibits contained in the record include a letter from appellant Pratt, as treasurer of the association, addressed to a prospective member. The letter was accompanied by an application form containing twenty-six questions to be answered by the applicant, who is instructed after he has signed it to forward it "with membership fee to R. E. Pratt, Treasurer," Omaha, Nebraska. The application contemplates reference to a named person as to the applicant's character and standing. There also appears upon the application the following:

> "Money Back Guarantee"
>
> "Our policies are issued subject to approval of the applicant. If not satisfactory they may be returned within ten days from date of issuance and all money paid thereon will be refunded promptly."

In addition to the foregoing, there was also enclosed with the letter of solicitation a separate printed "Absolute Guarantee" slip containing a provision in conformity with the one above quoted. On the face of this slip appears the following:

> "NOTE—It is not necessary to show the name of anyone as recommending you, as you have already been recommended to us by one of our members."

On the reverse side of said guarantee slip appears a printed copy of a letter from one of the members of the association residing at Baltimore, Maryland. In this letter the member in question expresses thanks for the promptness with which the association had paid benefits on account of his recent illness, and concludes with the following statement: "I am working on several of my friends to get them to join and expect to send you several applications real soon."

The appellants insist that the foregoing facts are insufficient to show any activities on their part in Virginia which bring them within the regulatory jurisdiction of the Commonwealth. In their reply brief they state their position thus: "* * * as the Stipulation of Facts on which this proceeding is based clearly establishes, there has been no solicitation by any agent in this State and all of the activities complained of take place, not in Virginia, but at the corporate appellant's principal office in Omaha, Nebraska. It is there that all mailing is done by appellants, all applications accepted, all contracts made and all claims paid."

The stipulation shows, however, that practically all of the business of the association in Virginia originates with and is the result of the activities of its Virginia members. The extent of those activities is not clearly defined, but the action of the association in mailing to prospective members a copy of the letter received by it from its Baltimore member, stating that he was working on several friends and *expected to send in their applications*, constitutes an implied invitation, not only to send in the names of persons recommended for membership, but also to solicit and send in

completed applications for membership. While the old members who are engaged in these activities of assisting in procuring new members have not been technically designated as agents of the association or specifically employed to solicit for it, nevertheless, its encouragement of same and acceptance of the fruits thereof constitute a ratification of their efforts in its behalf and renders it responsible therefor. The exhibits show also that the recommendation of the prospective member which is sent to the association by the old member is accepted without question and the prospective applicant is relieved of the usual requirement of furnishing any reference at all as to his qualifications for membership. It clearly appears that the association relies almost exclusively on these activities of its Virginia members to bring about an expansion of its Virginia business.

An additional Virginia activity lies in the fact that it has been customary for the appellant association to make investigations with respect to the validity of claims asserted against it arising in the State. Such investigations obviously constitute an essential function of the health insurance business.

Remittances in payment of benefit claims are sent from Omaha, but they are received and accepted *in Virginia* as a discharge of the association's obligations. If they miscarry in the mails and are not received by the beneficiary, or, if received, are not accepted, the obligations are not discharged.

Moreover, the fact that the application is accepted in Nebraska and the membership certificate is forwarded to the Virginia applicant *subject to his approval* renders it merely an offer on the part of the association to enter into the contract with the applicant. It is not contended that the applicant has theretofore ever examined or even seen the membership certificate, and it is left entirely to him to determine, after he receives it, whether its provisions are satisfactory and he will accept it. If he is not satisfied, he returns the certificate and receives back the amount tendered in payment with his application. If on the other hand he approves the provisions of the certificate and

accepts it, it is this act of acceptance in Virginia which consummates the contract.

The State Corporation Commission concluded that the foregoing activities of the appellants were such as to constitute violations of the Virginia Securities Act and to bring them within the jurisdiction of the State. It therefore ordered the appellants to cease and desist from any further continuation of such violations.

The appellants, however, take the position that such activities are not sufficient to subject them to the regulatory police powers of the State as set forth in the Virginia Securities Act and in the order of the Commission. They rely upon *Minnesota Commercial Men's Ass'n. v. Benn*, 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573, and other similar cases, in support of their position that the appellant association is not engaged in business activities in Virginia such as to bring them within the jurisdiction of the courts of this State. While the facts in the *Benn* case were quite similar to those in the record before us, the action there under consideration was one brought in Montana *by a beneficiary of a contract* which was held by a Montana resident at the time of his death. A Montana statute provided that any corporation doing business therein, if no officer or agent be found in that State, could be served with summons upon the Secretary of State, "who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said secretary of state shall be deemed personal service upon said corporation." The court held that the Minnesota association was not doing business in Montana, and, therefore, the service of summons upon the Secretary of State did not constitute service upon the corporation so as to authorize the rendition of a *pecuniary civil judgment* against it.

The proceeding here before us, however, is essentially different in its nature. It was instituted, not by a contract holder, but by the Commonwealth. The appellants were being investigated by the Commission to determine whether their activities did in fact violate the Securities Act and

constitute the commission in Virginia of a misdemeanor. The inquiry is quasi-criminal in its approach.

This distinction with respect to acts which violate State laws is clearly recognized in *Merrick* v. *Halsey & Co.*, 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498. In that case a Michigan District Court of the United States had entered a decree enjoining the enforcement of the Blue Sky Law of that State against a partnership composed of residents of New York and New Jersey. They were engaged in selling stocks, bonds, and other securities, *by mail* to persons in the State of Michigan, though they had no place of business or agents in the State. Upon appeal the Supreme Court reversed the District Court, dissolved the injunction and sustained the power of the State of Michigan to regulate their sales of securities *through the mails*.

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, process in a criminal proceeding was served on a soliciting agent of the Harvester Company, which had been indicted for alleged violation of the antitrust laws of the State of Kentucky. The company contended that its activities within the State were not sufficient to subject it to the jurisdiction of the State courts. The claim of the company was that its agents were engaged exclusively in interstate commerce, and for this reason, were exempt from local regulatory control. Upon this question the court had the following to say:

> "* * * The contention comes to this: so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention.
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> * * * * * * *
>
> "We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there

carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state." (234 U. S., at pages 587, 588 and 589.)

In the foregoing case, *criminal process* had been served on an agent of the company who had not been designated as an agent to receive summons on behalf of the company, but the validity of the service was, nevertheless, sustained by the Kentucky Court of Appeals, and this was affirmed by the Supreme Court.

The principal question presented here is whether the Commonwealth has jurisdiction to regulate appellants' sale of securities through the mails, supplemented by such other activities in the State as we have described. Where such sales are in violation of the regulatory provisions and constitute a crime under the laws of the State, are the violators subject to the jurisdiction of the State to punish for such violations? In other words, does the Commonwealth possess the jurisdiction and power to deal with the commission of crimes of this nature within its borders and punish same, although the transactions are principally carried on from without the State through the United States mails?

The general rule is thus stated in 14 Am. Jur., Criminal Law, section 227:

"A question often arises as to the jurisdiction of a crime where the accused, while in one state, sets in motion a force which operates in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person in another state with intent to injure him. In such cases the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act. * * *"

In *In re Palliser*, 136 U. S. 257, 266, 10 S. Ct. 1034, 34 L. Ed. 514, 518, the following was said:

> "When an offense is commited by means of a communication through the post office, the sender has some times, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter." (Citing authorities.) "But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, • • •." (Citing authorities.)

United States v. *Steinberg*, 62 F. (2d) 77, involved the jurisdiction of a United States District Court of New York to indict and punish a defendant who was accused of using the United States mails to defraud. The letter in question was mailed in Canada, and the defendant claimed that he had not committed any criminal act within the State of New York and that court was without jurisdiction to try the offense. In affirming a judgment of conviction by the District Court, the Circuit Court of Appeals of the Second Circuit used this language:

> "• • • It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which the evil is the fruit. *Strassheim* v. *Daily*, 221 U. S. 280, 284, 285, 31 S. Ct. 558, 55 L. Ed. 735; *Lamar* v. *United States*, 240 U. S. 60, 64, 65, 66, 36 S. Ct. 255, 60 L. Ed. 526; *Ford* v. *United States*, 273 U. S. 593, 620, 621, 47 S. Ct. 531, 71 L. Ed. 793. The Constitutional question is frivolous." (62 F. (2d) 78).

The Supreme Court denied a writ of certiorari to review this case. *Steinberg* v. *United States*, 289 U. S. 729, 53 S. Ct. 526, 77 L. Ed. 1478.

Additional authorities to the effect that a person may be guilty of crime by reason of the use of the United States mails, and that the crime is deemed to be committed in the

State where the mail is received and the prohibited results occur, are found in 22 C. J. S., Criminal Law, sections 134, 135. See also annotations in 42 A. L. R. 272; 43 A. L. R. 545; 141 A. L. R. 239, *et seq.*

We hold, in view of the authorities referred to, that the evidence in possession of the State Corporation Commission constituted good cause to conclude that the appellants had been engaged in selling securities in Virginia through the United States mail without complying with, and in violation of, the provisions of the applicable laws of the State.

In this situation, it seems that the Commission might have been justified in seeking an information or indictment in the appropriate court in accordance with the provisions of Section 15 of the Virginia Securities Act. This section provides that violation of the act constitutes a misdemeanor, punishable by a fine or confinement in jail, or both. If such information were issued by the prosecuting attorney or indictment found by the grand jury, extradition proceedings might have been had under section 6 of the Uniform Extradition Act, which was adopted by Nebraska Laws 1935, chapter 66, on May 23, 1935, and by the Acts of the General Assembly of Virginia, chapter 305, on March 28, 1940. This Uniform Act authorizes the Governor of Nebraska to grant extradition in cases where crimes are committed in another State, even though the accused was not in that State at the time of the commission of the crime and had not fled therefrom.[5]

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[5] The Uniform Extradition Act, according to the "Handbook on Interstate Crime Control," prepared by the Interstate Commission on Crime, at the time it was published in November, 1942, had been adopted in thirty-one of the States of the Union. Section 6 is as follows:

"Sec. 6. *Extradition of persons not present in demanding state at time of commission of crime.* The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

Instead of resorting to an information or indictment, however, the Commission elected to proceed under section 6 of the Virginia Securities Act by giving notice to the appellants to show cause why a cease and desist order should not be issued by the Commission restraining them from making further sales of securities in Virginia in violation of its laws. This proceeding is somewhat analogous to the customary priliminary hearing, conducted in cases where an accused is suspected of having committed a felony, to determine whether the charge against him is supported by sufficient evidence to justify laying it before a grand jury. The chief difference is that, in the proceedings here under review, the question to be determined was whether the evidence justified a finding that the Virginia Securities Law was being violated and supported the consequent order to discontinue such violations. The Commission found that the evidence was sufficient to show that such law was being violated, and we concur in that view and in the propriety of the entry of the order requiring such discontinuance.

The appellants insist that the notice served on them by registered mail does not meet the requirements of due process because they were not present within the State and the notice was served on them in Nebraska. It may be true that the business of the appellant association in Virginia has not been sufficiently extensive to justify the State in requiring it to appoint the Secretary of the Commonwealth as an agent upon whom process may be served at the suit of its Virginia contract holders. We are not called upon here to decide that question. It has been said that under some circumstances to require a corporation to defend, away from its home, a suit not arising out of its transactions in the territory of the forum might "lay too great and unreasonable a burden on the corporation to comport with due process." See *International Shoe Co. v. State of Washington*, 326 U. S. 310, 317, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057.

Service of process upon nonresidents of a State by registered mail in appropriate cases is a well-established practice. We sustained the validity of a Virginia statute which imputes to one using the highways of the State an agree-

ment that service upon such user may be had by serving the process upon the Director of the Division of Motor Vehicles of Virginia, the Director being required to send it to the nonresident defendant by registered mail at his last known address. We held that such process so served is sufficient to bring a nonresident within the jurisdiction of a Virginia court and amenable to its judgment in a civil action arising out of the negligent use of the highways. *Carroll* v. *Hutchinson*, 172 Va. 43, 200 S. E. 644. The validity of similar State statutes has been sustained by the United States Supreme Court. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A. L. R. 1230.

In *Wilentz* v. *Edwards*, 134 N. J. Eq. 522, 36 A. (2d) 423, notice by mail to a nonresident of a hearing, which arose under the Blue Sky Laws of New Jersey, was sustained as conforming to the requirement of due process.

In *International Shoe Co.* v. *State of Washington*, *supra*, the Supreme Court sustained the jurisdiction of the Washington State courts to entertain an action for the recovery of unemployment compensation taxes arising out of salaries paid the agents of the company for their services in soliciting orders in the State, although the authority of the solicitors was strictly limited to taking orders and submitting them at the home office of the company in St. Louis, Missouri. In that case, Mr. Chief Justice Stone had the following to say:

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the

maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' * * *

* * * * * * *

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on; even though no consent to be sued or authorization to an agent to accept service of process has been given. (326 U. S. 310, 316-317). And in connection with the question whether the substituted service gives reasonable assurance that the notice will be actual, the opinion continues:

"* * * Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. * * *" (326 U. S. 320).

We think the service of the notice by registered mail with the return postal receipt showing its delivery as required by the statute meets the requirements laid down in the *International Shoe Co.* case. The only complaint which the appellants are called upon to answer in the proceeding prescribed by the statute is one involving the question of their violation of the laws of Virginia with respect to the sale of their securities. This is a question which cannot be tried by any tribunal save those of this State, and therefore the appellants are subjected to no undue inconvenience.

Nor do we think the proceedings instituted by the Commission offend "traditional notions of fair play and substantial justice." As we have pointed out, the Commission might have undertaken to proceed against the appellants by information or indictment and extradition. The present proceeding is a very much less onerous one and is more favorable to the appellants, in that they are afforded an opportunity, without being subjected to a criminal trial, to have determined by the Commission, by this court, and also by the Supreme Court of the United States, if they so desire, the question whether their conduct has been such as to violate the criminal laws of the State and subject them to the process of its courts.

Appellants also contend that the Virginia Securities Law, as applied by the Commission, is an unconstitutional attempt to regulate the use of the United States mails. We do not so construe the act. The effect of the order is to restrain the appellants from using the United States mails in such manner as to commit a criminal act in the State of Virginia. We do not believe it can be successfully contended that the postal service, which was established and is operated by the States in their joint capacity as the Government of the United States, can be held to operate as a shield to protect persons in the commission of crime in any of the several States, nor has any authority in support of such a proposition been called to our attention.

Appellants also take the position that Subchapter 1 of Chapter 2A of Title 15 of the United States Code, Annotated, manifests an intention by Congress, through the Securities Exchange Commission, to occupy the field of regulating the sale of domestic securities to the exclusion of the States. Section 77r, however, provides as follows:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

It was clearly the intention of Congress to leave the States free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and, in the absence of such a conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction in this field. The appellants have not pointed out any such conflict and we have been unable to discover any.

On the whole case, we are of opinion to affirm the order of the Commission.

Affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible] 1949

No. [illegible] 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,
Appellants,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF STATE CORPORATION COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF APPELLANTS IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS B. GAY,
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Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 802

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY, *Appellants*,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF STATE CORPORATION COMMISSION, *Appellee*

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF APPELLANTS IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

I

Introduction

This brief is submitted in reply to the Statement of Appellee Opposing Jurisdiction And Motion To Dismiss Or Affirm filed herein (as permitted by Rule 12, paragraph 3, and Rule 7, paragraph 3) upon the asserted ground that no substantial Federal question is presented.

The merits of this appeal are not argued herein except as incidental to the jurisdictional issue of whether a substantial Federal question is presented.

The Court is referred to Appellants' Statement As To Jurisdiction filed herein for a full statement of the nature of the case, the questions presented, the statute involved and the opinion below.[1]

The Statement of Appellee Opposing Jurisdiction And Motion to Dismiss or Affirm is *predicated solely upon the assertion that no substantial Federal question is raised by this appeal. There is no denial* that appeal is the correct method of review here if any one of the constitutional questions involved is substantial. *There is no denial* by Appellee that both the State Corporation Commission and the Supreme Court of Appeals of Virginia treated the questions of the constitutionality of the state statute involved under the Fourteenth Amendment and under Article I, Section 8 of the Constitution as having been properly raised for their decision and as being determinative of the case. *There is no denial* that both the Commission and the court below passed upon the constitutional questions and determined them in favor of the validity of the state statute. *There is no denial* that the questions were properly preserved and brought here by the appeal papers; and *there is no denial* of the technical jurisdiction of this Court as to this appeal under the Judicial Code and Judiciary, adopted June 26, 1948, effective September 1, 1948.

Although not of immediate concern to the Court at this stage of the appeal the basic issue of the appeal, on the merits, is whether, upon the record in this case, Appellants can fairly be said to have been so present in Virginia, or to have conducted activities within the State to such an

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[1] The opinion below is reported in 188 Va. 877 and in 51 S. E. (2d) 263.

extent that the due process requirements of the Fourteenth Amendment were fulfilled when Appellants were subjected to a proceeding pursuant to Section 6 of the Virginia Securities Law and an *in personam* injunction issued against them upon notice by registered mail sent to them outside the State of Virginia. Appellee bases its objection to this Court's taking jurisdiction of the appeal to decide this basic issue on the ground that it raises no substantial Federal question, because (a) this Court has heretofore recognized the right of a State to regulate the promotion of the sale of securities by non-residents under such circumstances as are involved in this case, and (b) such notice of the proceedings as was given in this case is sufficient under the decisions of this Court to fulfill the due process requirements of the Fourteenth Amendment.

It is submitted that both of Appellee's grounds are without merit and that therefore a substantial Federal question is presented for the reasons set forth in Appellants' Statement As To Jurisdiction.

II

Appellants' Activities

The ultimate determination of whether the State of Virginia may validly exercise the police power which it has here attempted to exercise and of whether the notice served upon Appellants in the proceedings involved herein fulfills the due process requirements of the Fourteenth Amendment are dependent on the facts involved, i.e., the nature and extent of Appellants' activities in Virginia, if any. Prior to the hearing before the Virginia State Corporation Commission the facts were stipulated by the parties but were later supplemented by Appellee at the hearing by the introduction in evidence of literature mailed by Appel-

lants to one of the employees of the Commission in the belief that he was a prospective member.

Appellants have consistently contended that the record reveals no activities on their part which took place in Virginia sufficient to bring them within the regulatory jurisdiction of the State. The Virginia Supreme Court of Appeals rejected this contention on the basis of four alleged activities of Appellants which in its opinion occurred in Virginia, *although neither the State Corporation Commission in its opinion supporting the order here appealed from nor the Attorney General, either orally or in his brief before the Virginia Supreme Court of Appeals, had asserted that any of these activities took place in the State.* This phase of the case was discussed in Appellants' Statement As To Jurisdiction, but in view of Appellee's summary of the facts in its Statement Opposing Jurisdiction it is believed necessary here to review briefly these four alleged activities in the light of the record in this case.

(a) *Solicitation by old members.* Appellants contend that the case of *Minnesota Commercial Men's Ass'n v. Benn*, 261 U. S. 140 (1923), discussed in their Statement As To Jurisdiction, is decisive of this factual aspect of the case, as this Court there held that solicitation by members of a similar association in a state in which it was not domesticated, and without authority to obligate it, was not such an activity as to subject the association to the jurisdiction of that state.

Paragraph 6 of the Stipulation of Facts herein covered the question as to solicitation as follows:

> "6. New members are usually obtained through recommendations of existing members who submit to the Association at its home office in Omaha the names of friends and acquaintances believed to be able to qualify for membership."

Both the Virginia Court and Appellee now attempt to support their position that solicitation by old members constitutes an activity of Appellants in Virginia by inferences drawn from the exhibits introduced in evidence by Appellee. The point which Appellee has overlooked, and which should here be emphasized, is that these exhibits are copies of literature mailed by Appellants *to prospective members* and *not to old members* of the Association, and that under the stipulated facts here, the activity of the old members was wholly voluntary and was limited to *the submission of names* of prospects by them to the Association. Even, however, if this literature could be construed to be an implied invitation to a prospective member to solicit new members if and when he becomes a member, such an interpretation of the exhibits is directly contrary to paragraph 2 of the Stipulation of Facts, which provides as follows:

> "2. Travelers Health Association has not now nor has it ever had any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia."

Obviously the literature, in the main, served only as an indication to the prospective member who received it of the satisfactory manner in which the Appellant Association recognizes and pays its claims.

It is significant to note that the Supreme Court of Appeals of Virginia in discussing the activities of Appellants avoided any mention of the word "representative" when referring to the stipulated facts. It is submitted that the word "representative" used in the stipulation in conjunction with the words "officer", "official", and "agent" supports Appellants' contention that they have had no one in Virginia at any time performing activities for them, and

the finding of the Virginia Court that the 800 Virginia members referred to in paragraph 9 of the Stipulation of Facts were either the agents or representatives of Appellants in any capacity is manifestly contrary to the facts as stipulated.

(b) *Investigation of claims by Appellants.* In the Stipulation of Facts it is agreed that the Appellant Association "has caused" claims to be investigated. This, read in light of the stipulation that the Appellant Association has never had any agents, officers, officials, or representatives in the State of Virginia, seems clearly to establish that any investigations that may have been made in Virginia were not made by any agents or representatives of Appellants, and consequently did not constitute an activity on their part in the State.

(c) *Discharge of claims.* The Stipulation of Facts conclusively controls this factual aspect, as the last sentence of paragraph 4 of the Stipulation of Facts provides as follows:

> "All claims for insurance benefits are submitted to the Association in Omaha and all insurance benefits are paid from the home office there."

(d) *Locus Contractus.* The Stipulation of Facts establishes that every applicant is elected to membership in Omaha, Nebraska, and the certificate of membership is issued to him in Omaha.[2] Each certificate goes into effect when issued but is subject to cancellation by the new member if, within ten days after its receipt, he decides he does not want it. In the meantime, however, he is covered by insurance protection that it affords. The subsequent act of a

[2] Appellee in its brief filed in the Supreme Court of Appeals of Virginia admitted at p. 2 that "the actual contract of insurance is made in Nebraska."

member in exercising his right to cancel the insurance within a limited period does not therefore constitute any part of the *consummation* of the contract and cannot fairly be said to be an activity of Appellants.

Appellants submit that they have never been present in Virginia nor otherwise conducted any activities in Virginia, that this is fully supported by the record and that therefore Appellee's grounds opposing jurisdiction and in support of its Motion to Dismiss or Affirm should be considered in the light of that factual background.

III

State's Power to Regulate Promotion of the Sale of Securities Does Not Extend to Non-Residents Using Only Interstate Mails.

In support of its contention that the Commonwealth of Virginia may regulate the promotion of the sale of securities by Appellants, Appellee cites five cases—the three "Blue Sky Cases"[3] and *In re Pollister*, 136 U. S. 257 (1890) and *U. S. v. Steinberg*, 62 F. (2d) 77 (1932). The "Blue Sky Cases" were discussed in Appellant's Statement As to Jurisdiction, where it was pointed out that no question of jurisdiction or of the validity of service of process was before the court in any of these cases. Further comment here is considered unnecessary, except as to the last of these cases, *Merrick v. N. W. Halsey & Co.*, on which Appellee appears to place great reliance.

The statement of the facts and analysis of the decision in the *Merrick* case in Appellee's Statement Opposing Jur-

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[3] *Hall v. Geiger-Jones Co.*, 242 U. S. 539, *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, and *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568. These cases were referred to by this Court as the "Blue Sky Cases" in footnote, 242 U. S. 539.

isdiction are not entirely correct for Appellee infers that the only plaintiff attacking the Michigan Blue Sky Law was a partnership, composed of non-residents of Michigan who had no offices or salesmen in Michigan, but merely solicited orders for the purchase of securities by means of the mails. As can be seen from the court's statement of the case, there were numerous plaintiffs in the *Merrick* case, including corporations, individuals, co-partners, residents and citizens of different States, all engaged in the investment banking business and in the business of buying and selling stocks, bonds and other securities and "offering them for sale in Michigan" (page 569). The court further stated with respect to plaintiffs generally:

> "They sent into the State their agents and employees, who there solicit orders for the securities and transmit such orders to complainants at Chicago, Illinois, which orders are accepted and the securities so purchased are transmitted to Michigan" (p. 569).

It is true that after the case had been brought leave to intervene as a party plaintiff was granted the New York partnership of Remick Hodges & Company which was made up of non-residents of Michigan who sold securities in that State through the use only of interstate mails and had no place of business in the State and were not at that time sending agents into the State. It is evident from the opinion that Remick Hodges & Company made no issue of their absentee status with respect to the State of Michigan but to the contrary alleged themselves to be in like situation with the original plaintiffs and adopted the allegations of the bills of such plaintiffs who had voluntarily entered the State to have determined the question of the constitutionality of the act with respect to security dealers who were admittedly doing business in the State by the use of agents personally soliciting orders within the State.

The issue raised in the present case as to jurisdiction and the validity of the service of process was not raised in the *Merrick* case, was not before the court, and the court did not hold, as Appellee alleges, that the assertion of jurisdiction over non-residents in the manner here attempted by Appellee was a valid exercise of the police power of the State.

In *In re Palliser*, *supra*, and *United States* v. *Steinberg*, *supra*, the remaining two cases relied upon by Appellee in support of its power to exercise jurisdiction over Appellants here, there were no *in personam* decrees involved. Those cases involved criminal prosecutions in courts of the United States for violations of Federal statutes in which the courts had in some manner acquired actual physical jurisdiction of defendants who were charged with having committed crimes in the district in which they were being prosecuted from points outside that district. These cases therefore involved a situation wholly different from the case at bar and in no way support the validity of the police power which the Commonwealth of Virginia has attempted to assert in this case.

Appellee also cites the section of the Securities Act of 1933 which provides that nothing in that act shall affect the jurisdiction of the securities commissions of the various States. Since the Virginia Commission in the present case had no jurisdiction in the first instance, this provision of the Federal act manifestly adds nothing to Appellee's position.

It is submitted, in view of the foregoing, that Appellee has cited no authorities in support of the validity of the power of the Commonwealth of Virginia to regulate the promotion of the sale of securities by non-residents merely through the use of the mails and who have not been present within the State nor conducted any activities therein, and

that for the reasons set forth in Appellants' Statement As To Jurisdiction the Supreme Court of Appeals of Virginia, in upholding the validity of this police power asserted by Appellee, pursuant to Section 6 of the Virginia Securities Law, has decided a substantial Federal question not heretofore determined by this Court and in a manner inconsistent with the applicable principles established by this Court as to the requirement of the due process of law as guaranteed by the Fourteenth Amendment.

IV

Service of Process in This Case Not Within the Due Process Requirements of the Fourteenth Amendment

Appellee contends that the substituted or constructive service of process sent to Appellants by registered mail outside the State constitutes sufficient compliance with the due process requirements of the Fourteenth Amendment to sustain the validity of the prohibitory *in personam* decree here appealed from. In support of its contention Appellee relied primarily upon the case of *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945). This case was discussed in Appellants' Statement As to Jurisdiction and distinguished from the situation presently before this Court. In view, however, of the great reliance which Appellee places in the *International Shoe Company* case it is believed that some further comment concerning this case is here necessary.

The *International Shoe Company* case supports neither the conclusions reached by the Virginia Supreme Court of Appeals nor the argument advanced by Appellee in its Statement Opposing Jurisdiction. In that case the shoe company had a number of agents in the State of Washington who worked there not only soliciting orders but also

demonstrating or exhibiting the company's product. The action was brought to compel payment of a state unemployment insurance tax, which was based upon the compensation earned by the company agents while working in the State of Washington. This compensation was paid by the company to these agents in the State of Washington for services performed there. Upon those facts the proceeding might well have been considered *quasi in rem* rather than *in personam*.

No violence was done to the theory of the "presence" of the intangible corporate personality of the International Shoe Company in Washington in holding that under those facts the corporation was sufficiently present so that the tax could be imposed upon the Washington earnings of the Washington salesmen. The court was there dealing with a situation involving the actual presence of actual agents located and residing within the territorial limits of the State, whereas in the present case Appellants, as the parties stipulated and as has been developed hereinabove, have not now nor have they ever had any office, officer, agent, representative, bank account or property located in Virginia, and have conducted no activities in Virginia.

The following statement from the opinion in the *International Shoe Company* case conclusively establishes the necessity for at least some activity by an agent actually within the State to justify constructive service of process on a non-resident individual or an undomesticated foreign corporation:

> "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24, it is clear that unlike an individual its 'presence' without, as well as within the state of its origin can be manifested only by activities carried on in its be-

> half by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize *those activities of the corporation's agent within the state* which courts will deem to be sufficient to satisfy the demands of due process." (Italics supplied.) (p. 316.)

The decision in the *International Shoe Company* case was actually based upon the fact that the company had conducted activities within the State and had thereby enjoyed the benefits and protection of the laws of the State.

In the case at bar Appellants have conducted no activities in Virginia and have enjoyed no benefits and protection of the laws of the State of Virginia, and there is no legal justification for it, on any theory of implied agency or otherwise, attempting to extend its jurisdiction and process beyond its geographic limits. On the basis of the *International Shoe Company* case itself the Appellee had no jurisdiction and could acquire none over the person of either of the Appellants in this case.

The Appellee also relied on the two cases of this Court sustaining the constitutionality of state statutes authorizing constructive service of process on non-resident owners of automobiles using the highways of a State,—*Hess* v. *Pawloski*, 274 U. S. 352 (1927), and *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). The situation in those cases was obviously quite different from the present case, for the vehicles were actually driven within the jurisdiction of the State of the forum by the defendants, and the statutes made such presence within the State the equivalent of the appointing of the Secretary of State the defendants' agents for service of process.

Appellee also relies on the Federal District Court case of *Storey* v. *United Ins. Co.*, 64 F. Sup. 896 (1946) and the New Jersey State case of *Wilentz* v. *Edwards*, 36 Atl. (2d) 423 (1944).

In the *Storey* case the South Carolina District Court held that the contract of insurance was a South Carolina contract and that the defendant insurance company was doing business in that State, thereby justifying constructive service of process on the non-resident insurance company through the State Insurance Commissioner as its agent. The court distinguished *Minnesota Commercial Men's Ass'n* v. *Benn, supra*, on the grounds that there the insurance company was not doing business in the State of the forum. As pointed out in Appellants' Statement As To Jurisdiction, the manner in which the Minnesota Company did business was for all practical purposes identical with the Appellant Association here.

The *Wilentz* case involved a bill in chancery under the New Jersey Securities Law seeking to restrain three individuals from entering the State and doing business therein until they had complied with the proposed decree. Service of process was made by registered mail outside the State. The court in upholding the restraining order expressly stated that the question of whether or not the defendants, if they violated the order, would be liable for contempt was not before the court and, consequently, was not being decided. If the order had been held to be simply directory and not prohibitory so that it did not affect the person or property of defendants it would do no more than state, just as the statute does there and here, that it would be unlawful to enter the State and sell securities there. On the other hand, if it had been held that defendants could be punished under contempt proceedings for violation of the order, then it was definitely "*in personam*" and would be unconstitutional

because of inadequate service of process. Since the New Jersey court did not pass upon these questions the case is no authority either way. In any event, the defendants in the *Wilentz* case intended to come into the State to traffic in securities and the proposed order only purported to forbid defendant from undertaking to deal in securities "within or from this State" while the order here appealed from prohibits Appellants from offering for sale or promoting the sale of securities in Virginia *from within or without the State*. On that basis they are clearly distinguishable.

It is submitted, in view of the foregoing that Appellee makes no showing and has cited no case which supports the validity of constructive or substituted service of process under the circumstances presented by this case and that for the reasons set forth in Appellants' Statement As To Jurisdiction the Supreme Court of Appeals of Virginia, in upholding the validity of the service of process here, as authorized by Section 6 of the Virginia Securities Law, has decided a substantial Federal question not heretofore determined by this Court and in a manner inconsistent with the applicable principles established by this Court as to the requirements of due process of law of the Fourteenth Amendment.

V

Conclusion

WHEREFORE, Appellants respectfully submit that the questions involved in this appeal as stated and discussed in detail in their Statement As To Jurisdiction are substantial Federal questions which merit the consideration and decision of this Court.

Respectfully submitted,

THOMAS B. GAY,
H. MERRILL PASCO,
Counsel for Appellants.

Dated: May 12, 1949.

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OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

Appeal from the Supreme Court of Appeals of the State of Virginia

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported officially in Volume 188 of the Virginia Reports at page 492. The opinion is also reported in Volume 51 of the Southeastern Reporter, 2d Series, page 263.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

In conformity with paragraph 1 of Rule 12 of the Rules of the Court, Appellants have heretofore filed their State

ment As To Jurisdiction setting forth in detail the grounds on which the jurisdiction of the Court is invoked. In addition, Appellants filed a brief in reply to Appellee's Statement Opposing Jurisdiction And Motion To Dismiss Or Affirm. Thereafter, on June 13, 1949, this Honorable Court entered the following order:

> "In this case probable jurisdiction is noted and the case is transferred to the summary docket." (R. 51)*

In summary, the grounds on which the jurisdiction of this Court is invoked are as follows:

(1) The case meets the requirements of Section 1257(2) of the Judicial Code and Judiciary, approved January 25, 1948, effective September 1, 1948 (Title 28 U.S.C., Section 1257(2)) in that the validity of Section 6 of the Virginia Securities Law (an act of the General Assembly of Virginia, approved March 23, 1932; Acts of 1932, Chap. 236, p. 434; Section 3848(52) of Michie's 1942 Code of Virginia)** is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the final judgment rendered in the Supreme Court of Appeals of Virginia, dated January 10, 1949, is in favor of the validity of the statute (R. 29).

(2) The issue of the constitutionality of Section 6 of the Virginia Securities Law (herein called the "Securities Law") raises two substantial federal questions decided by the court below contrary to the controlling decisions of this Court: (a) the validity of the action of a state in attempting to subject a non-resident individual and an undomesticated foreign corporation to its jurisdiction by

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* References to the pages of the printed Transcript of Record are made herein as follows: (R.).

** See Appendix of this brief p. 38 for full text of this act

constructive service of process when they were not present in and have not performed any act within the state other than the transmitting of communications to its residents through the United States mails from outside the state, and (b) the validity of the action of a state in attempting to control the activities of such an individual and corporation occurring outside the state.

Appellants respectfully refer the Court to their Statement As To Jurisdiction for a more complete statement of the grounds on which the jurisdiction of this Court is invoked and their reasons and authorities in support thereof.

STATEMENT OF THE CASE

The Appellants in this case are Travelers Health Association, a non-profit Nebraska corporation, and R. E. Pratt, the Treasurer of the Association, a resident of Nebraska. The Association's principal purpose is to afford its members health insurance benefits which it does under the control and supervision of the Insurance Department of the State of Nebraska. It conducts all of its business from its Omaha office by use of the United States mails and has never had any soliciting agents operating in Virginia. It has for a number of years been acquiring members from among residents of the State of Virginia solely through the use of the United States mail from Omaha.

The case is an appeal from the judgment of the Virginia Supreme Court of Appeals affirming a cease and desist order in the nature of a permanent injunction entered by the Virginia State Corporation Commission on January 5, 1948,* pursuant to Section 6 of the Securities Law, enjoin-

* In the reported opinion of the Virginia Supreme Court of Appeals this order was inadvertently referred to as having been entered on May 3, 1948.

ing and restraining the Appellants from offering, advertising, promoting or selling membership certificates or contracts of indemnity or insurance in Virginia until a permit or authorization so to do had been secured from the Commission as required by the Securities Law.* There was no charge or intimation that there was anything fraudulent or misleading about Appellants' activities, nor that the membership certificates were fraudulent or in any manner inferior or misleading, financially or otherwise, nor that the terms of the certificates failed to meet the requirements of either Virginia or Nebraska laws.

The proceeding was instituted by the Virginia Commission on May 5, 1947, based upon information received from the files of the Commission, by the issue of an order against

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* Section 2 of the Securities Law (Section 3848(47) of Michie's 1942 Code of Virginia) includes such membership certificates and contracts within the definition of the term "securities", and Section 5 of the Law (Section 3848(50) of Michie's Code) requires every person or corporation desiring to engage in the selling or offering for sale of "securities" in Virginia to obtain such a permit as is referred to in the Commission's order of January 5, 1948. Section 9 of the Law (Section 3848(55) of Michie's Code) provides that such a permit will be issued only upon compliance with certain conditions specified therein. Section 15 of the Law (Section 3848(61) of Michie's Code) provides that any person violating the Law or attempting to evade its provisions shall be guilty of a misdemeanor and punished by fine or confinement in jail or both where not otherwise provided, and Section 17 of the Law (Section 3848(63) of Michie's Code) authorizes the Commission to impose a fine not exceeding $500.00 for failure or refusal to comply with any lawful order issued under the Law.

Section 6 of the Securities Law (Section 3848(52) of Michie's Code) (see Appendix of this brief p. 38 for full text) includes within the scope of the Law the promotion, advertising and sale of securities to Virginia residents by interstate mail, and authorizes the Virginia Corporation Commission, on its own motion or upon complaint of any resident of the state of violations of the Securities Law, to issue a cease and desist order restraining further violations after at least ten days notice by registered mail to persons, corporations or associations so offering, promoting or selling such securities in the state by means of interstate mail when such persons, corporations or associations cannot be found within the state.

Appellants, pursuant to Section 6 of the Securities Law, charging them with advertising, offering and selling "within the State of Virginia" contracts of insurance and/or indemnity in Travelers Health Association without having obtained the necessary permit. They were summoned to appear before the Commission in Richmond, Virginia, on May 19, 1947, to show cause why a cease and desist order in the nature of a *permanent injunction* should not be issued against them, restraining them from advertising, offering and selling these "securities" in Virginia, by *interstate mail or otherwise*, until properly authorized to do so by the Commission (R. 7).

Since there was no way to obtain personal service of process on Appellants in Virginia, as they were not residents of and were not in any manner present in Virginia, and were not licensed to transact business there, the Commission attempted to obtain jurisdiction over them for the purpose of the above hearing by forwarding attested copies of the order of May 5, 1947, to them in Nebraska by registered mail as authorized by Section 6 of the Securities Law (R. 9).

On May 13, 1947, Appellants, by counsel, entered a special appearance before the Commission only to object to the alleged jurisdiction asserted by Virginia, and to move the Commission to set aside and quash the service of process alleged to have been had upon them (R. 9). The grounds for the motion to quash were (a) that the proceeding was one *in personam* and the constructive service of process was insufficient to support the kind of relief sought and ultimately granted by the Commission, and (b) Section 6 of the Securities Law as applied to Appellants was in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution. The Federal questions sought to be reviewed on this appeal were therefore explicitly raised at the very outset of this case.

The cause came on for hearing on Appellants' motion to quash the service of summons on September 18, 1947, at which time the issues were argued by counsel upon the following stipulation or agreed statement of facts and upon exhibits introduced in evidence:

"1. Travelers Health Association is a non-profit membership association incorporated for the past forty-two years under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

"2. Travelers Health Association *has not now, nor has it ever had any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia.*

"3. Each of the members of said Association *receives by mail from Omaha, Nebraska,* when accepted as a member, *a membership certificate* providing for certain health insurance benefits and *requiring the member,* from time to time, *to forward by mail to Omaha, Nebraska,* the actual cost of such protection through the payment of assessments as levied.

"4. *Every application for membership is received and acted upon by the Association in Omaha. Every applicant regardless of his place of residence, is elected to membership in the offices of the Association in Omaha. All assessments to cover insurance costs and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha, and all insurance benefits are paid from the home office there.*

"5. *All notices to members are issued from the home office in Omaha, Nebraska,* addressed to the members

at their respective places of residence throughout the United States, and are then deposited in the United States Post Office in the City of Omaha for transmission through the United States mails to such members.

"6. *New members are usually obtained through recommendations of existing members who submit to the Association at its home office in Omaha the names of friends and acquaintances believed to be able to qualify for membership.*

"7. *The Association at Omaha then writes to each such person*, wherever he may reside, enclosing an application blank *and suggesting that he apply for membership* forthwith in order to secure the advantages of membership, which include health insurance protection and claim payments ~~when ill~~. *All such letters are transmitted by mail from the United States Post Office in Omaha.*

"8. If upon receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank wherever he may reside *and sends it by mail or delivers it personally to the home office of the Association in Omaha, where it is received and acted upon.*

"9. Since beginning business, Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia *in the manner indicated above.* During such periods it has caused many claims to be investigated. *Payment of claims has been made by mail from the home office in Omaha.* The Association now has approximately eight hundred members (certificates in force) in Virginia.

"10. *The only notice received by the respondents of this proceeding was the receipt on May 9, 1947, by registered mail* of a copy of the proceeding as instituted, known as Case No. 8816, dated May 5, 1947.

"11. R. E. Pratt resides in Omaha, Nebraska." (R. 11) (Italics supplied)

The Commission overruled Appellants' motion to quash the service of process and entered a final order on January 5, 1948, in the form of a *permanent injunction*, as authorized by Section 6 of the Securities Law, restraining Appellants from further advertising, offering and/or selling in Virginia, *through the medium of interstate mail or otherwise*, the "securities" in question until authority to do so is granted them by the Commission and the order of January 5, 1948, duly vacated. (R. 15)

An appeal to the Supreme Court of Appeals of Virginia was awarded Appellants on May 17, 1948 (R. 6). The principal assignments of error relied upon were that the Commission had erred in failing to hold that Section 6 of the Securities Law, as applied to the Appellants, denied them the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. On January 10, 1949, the Supreme Court of Appeals of Virginia affirmed the judgment of the Commission and expressly sustained the validity of Section 6 of the Securities Law and the application thereof to Appellants (R. 29-43).

SPECIFICATIONS OF ERRORS RELIED UPON

1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the final order of the State Corporation Commission rendered January 5, 1948, and thereby sustaining the validity of Section 6 of the Securities Law.

2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the issuance of the cease and desist order in the form of a permanent injunction against Appellants pursuant to Section 6 of the said Securities Law, deprived Appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

SUMMARY OF ARGUMENT

The final order of the Virginia Commission of January 5, 1948, issued pursuant to Section 6 of the Securities Law, is an *in personam* decree in the form of a permanent injunction prohibiting Appellants, on pain of fine and/or imprisonment; from acquiring additional members for the Association in Virginia, even though Appellants in so doing are not present in and perform no acts within Virginia. Furthermore, jurisdiction over the Appellants for the judicial proceeding at which this permanent restraining order or injunction was issued, was *based only upon service of process sent by registered mail to them in Nebraska*, as authorized by Section 6 of the Securities Law. Appellants, therefore, while fully recognizing the power of Virginia to regulate and control the activities of foreign corporations and non-resident individuals present or occuring within the territorial limits of the State, assert that:

1. Section 6 of the Securities Law as interpreted and applied to Appellants by the Virginia Commission in this case and affirmed by the Virginia Supreme Court of Appeals, denies to Appellants the rights of due process guaranteed to them by the Fourteenth Amendment of the Federal Constitution, *for the record herein establishes that Appellants have never been domesticated or otherwise been present, residing or doing business in Virginia*, and the communications which passed between Appellants and Virginia members and membership prospects through the interstate mails was a wholly insufficient activity to bring constructive service of process by registered mail sent beyond the state borders, within the requirements of the due process clause of the Fourteenth Amendment, as defined by the decisions of this Court from *Pennoyer* v. *Neff*, 95 U. S.

714 (1887), to *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

2. The record in this case does not support the finding of the Virginia Supreme Court of Appeals that there were sufficient activities of Appellants in Virginia to bring constructive service of process sent to another state by registered mail within the due process requirements of the Fourteenth Amendment, *and this Court may properly make these findings the subject of inquiry here for they are without evidence in the record to support them and result in Appellants being deprived of the rights guaranteed them by the Fourteenth Amendment.*

3. The decision of the Virginia Court interprets and applies Section 6 of the Securities Law in such manner as to control the activities of Appellants occurring beyond the borders of the State, in violation of the due process provision of the Fourteenth Amendment to the Constitution of the United States as construed by prior controlling decisions of this Court.

ARGUMENT

I.

Invalidity Of The Service of Process

In cases where "securities" are advertised, offered or sold through the mails and other similar means of interstate communication to residents of Virginia, in contravention of its Securities Law, and the parties so offering, advertising or selling the "securities" are not present within the State, Section 6 of the Law authorizes the State Corporation Commission to obtain jurisdiction over them—

> "through the medium of at least ten days' notice instead of five by registered mail, return receipt de-

mailed, to the address or addresses of such person or persons, firms, corporation, society or association insofar as such address or addresses shall be known or shall be available or by publication of notice in a newspaper published in the city of Richmond of general circulation in the State, beginning at least ten days prior to the date set for hearing. . . ."

The decretal paragraph of the final order issued by the Virginia Commission against Appellants, after it assumed jurisdiction over them pursuant to notice by registered mail sent to Nebraska, provides as follows:

> "It Is ADJUDGED, ORDERED AND DECREED, That Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, be, and they hereby are, directed to cease and desist, and that they be, and they hereby are, enjoined and restrained, until further order of the Commission to the contrary, personally, and/or through any employee, agent, or representative, and/or through medium of any advertisement from within or from without the State, and/or through the mails or otherwise, by intra- or inter-state communication, from offering, advertising, promoting, selling, assisting or participating in or acting in furtherance of, the offer, advertisement, sale and/or promotion in Virginia of contracts of insurance and/or indemnity, unless and until otherwise ordered, or unless and until permit or authorization by the State Corporation Commission shall have been issued according to law, or unless and until qualification shall have been effected under the Insurance Laws, and until this order to cease and desist shall have been duly vacated according to law; . . ." (R. 17)

Sections 15 and 17 of the Securities Law* provide for fines and/or imprisonment for the violation of the Securities

* See footnote p. 4, *supra*.

Law or any order of the Commission issued pursuant to its provisions.

The pertinent uncontroverted facts therefore are: (a) that the final order of the Virginia Commission was authorized by Section 6 of the Securities Law, (b) that the order was not directed against any property or *res* within the jurisdiction of the Commission but specifically required Appellants *personally* to refrain from doing the things prohibited in the order, and is therefore an *in personam* judgment in the form of a permanent compulsory injunction, (c) that violations of the order are punishable by fines or imprisonment, and (d) that the jurisdiction of the Commission in entering its *in personam* judgment was based upon constructive service of process, as authorized by Section 6 of the Securities Law, rather than by direct or personal service of process.

Appellants contend that under the circumstances of this case the service of process, upon which the final order of the Virginia Commission was based, does not meet the requirements of due "judicial" process as defined by this Court from time to time. "Judicial" due process is to be distinguished from "legislative" due process, which is dealt with in a subsequent section of this brief concerning the power of a state to regulate activities of persons and corporations beyond its borders.

A.

Analysis of Cases Defining the Requirements of Judicial Due Process

In holding that Section 6 of the Securities Law did not deny Appellants due process of law, the Supreme Court of Appeals of Virginia relied in large measure upon the decision in *International Shoe Co. v. Washington*, 326 U. S. 310

(1945). This case is the most recent of a long line of cases dating back to *Pennoyer* v. *Neff*, 95 U. S. 714 (1878) (non-resident defendant) and *St. Clair* v. *Cox*, 106 U. S. 350 (1882) (undomesticated corporate defendant), in which this Court consistently has held that the courts of one state can not, without a violation of the due process clause of the Fourteenth Amendment, extend their authority beyond their jurisdiction so as to subject to that power, by *in personam* decrees, the residents of another state or foreign undomesticated corporations *when such individuals and corporations are not within the jurisdiction of the court rendering the judgment*. Appellants contend that neither the *International Shoe Company Case* nor any of the cases which preceded it support the decision of the Virginia Court in the case at bar, for none of them have held either a non-resident individual or an undomesticated foreign corporation to be within the jurisdiction of the court of a state unless the individual sought to be charged with violation of local law was at some time present within the jurisdiction either personally or by an agent, and, if a corporation, conducted some activity within the state by an agent *physically present there*.

(1) *Cases Involving Individual Defendants.*

In *Pennoyer* v. *Neff* (1878), *supra*, this Court held that service by publication against a non-resident did not meet the requirements of due process, and in *Wilson* v. *Seligman*, 144 U. S. 41 (1892), service by notice sent to defendant outside the state was held defective for the same reason. In *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518 (1916), where a Pennsylvania court sought to adjudicate the personal rights of a resident of California in a garnishment proceeding without personal service of process, the foregoing principle was reaffirmed, and in *McDonald* v.

Mabee, 243 U. S. 90 (1917), due process requirements were held to be violated where a Texas court sought to adjudicate the personal rights of the defendant domiciled in Missouri, when service of process was by publication. Likewise, in *Flexner v. Farson*, 248 U. S. 289 (1919), the Court held that due process requirements were violated by a Kentucky court when it attempted to render an *in personam* decree against members of an Illinois partnership by service of process upon a former agent of the partnership in Kentucky after his agency had been terminated.

Appellants therefore submit that this Court has never held constructive service of process on a non-resident *individual* to be within the requirements of due process unless the individual was domiciled in the state, or was physically present there, or had been present there in the past in connection with the act complained of, or had an agent physically present there. In the present case the individual Appellant is not domiciled in Virginia, has never been present there and has conducted no business in that state, and therefore cannot constitutionally be subjected to the jurisdiction of the state by constructive service of process.

(2) *Cases Involving Corporate Defendants.*

Turning now to the the cases involving the invalidity of service of process on corporate defendants, this Court in *St. Clair v. Cox* (1882), *supra*, first applied the doctrine of *Pennoyer v. Neff* (1878), *supra*, to an undomesticated corporation where a Michigan court sought to adjudicate the rights of the corporation based upon personal service on its agent in Michigan, there having been no showing that the corporation was doing business in the state or that the agent was more than casually present there.

The following cases have also held service of process on

an agent physically present in the state insufficient to meet the requirements of due process: *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530 (1907) (soliciting agent); *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723 (1915) (soliciting agent); *Philadelphia & Reading R. Co.* v. *McKibbin*, 243 U. S. 264 (1917) (present in state only by connecting carrier); *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79 (1917) (soliciting agent); *Rosenberg Bros. Co.* v. *Curtis Brown Co.*, 260 U. S. 516 (1923) (periodic presence of agent to purchase supplies for resale in another state). See also *Goldey* v. *Morning News*, 156 U. S. 518 (1895), and *Riverside Mills* v. *Menefee*, 237 U. S. 189 (1915), where this Court held that foreign undomesticated corporations not doing business in a state could not be subjected to the jurisdiction of the courts of that state upon service of process on one of the officers who happened to be a resident of, or otherwise causally present in the state.

Additional cases decided by this Court involving undomesticated insurance corporations in which the question of the adequacy of service of process was involved are *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573 (1910), and *Providence Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103 (1915), where the fact that the insurance companies had policyholders residing in the state of the forum was held *not* sufficient to justify substituted service of process, the insurance companies having withdrawn from the state and ceased doing business there prior to the institution of the suits. In the *Hunter Case* the action was on policies that were not issued and sold in the state of the forum and in the *Providence Savings Association Case* the action was for collection of a privilege tax levied by the state of the forum.

In *Old Wayne Life Ins. Co.* v. *McDonough*, 204 U. S. 8

(1908), it was also held that a Pennsylvania court had violated the requirements of due process in attempting to adjudicate the rights of an Indiana insurance corporation in an action brought by a Pennsylvania resident on a policy negotiated outside that state. Service of process was had upon the corporation through the state insurance commissioner, as provided by the Pennsylvania statute. This Court based its decision on the theory that, although the state statute provided that the presence of a corporation doing business in the state constituted the appointment of the state insurance commissioner as agent to accept service of process in cases involving business transacted by it in Pennsylvania, it did not extend to cases involving business that was not transacted in Pennsylvania.

Finally, reference is made to the case of *Minnesota Commercial Men's Assoc.* v. *Benn*, 261 U. S. 140 (1923), *which was cited by this Court in the International Shoe Company Case as an example of an undomesticated corporation which had not sufficient contacts with the state of the forum to permit constructive service of process.* In the *Benn Case* a Minnesota non-stock, non-profit insurance corporation had accepted a resident of Montana as a member, thereby affording him health and accident insurance protection. All aspects of the acquisition of this Montana member were handled by interstate mail, which was the defendant's customary method of doing business although its Montana members solicited new members voluntarily from time to time. Suit was brought in Montana against the corporation on the membership contract, based upon constructive service of process, and judgment was entered by default. When the judgment was sought to be enforced in Minnesota this Court held that the service of process under the circumstances did not meet the constitutional requirements of due process. The defendant had no office,

agent or property in Montana and transacted all of its business by mail from its Minnesota office in a manner identical with the corporate Appellant in the case at bar, and this Court held that there was not sufficient activity in Montana "to warrant the inference that the corporation had subjected itself to the local jurisdiction, . . ." (p. 145)

Appellants therefore submit that in the case of corporations, as well as individuals, this Court, down to and including the *International Shoe Company Case*, has never held that an undomesticated corporation which has been neither present nor otherwise doing business in a state, can, by constructive service of process sent out of the state, be subjected to the jurisdiction of that state in *in personam* proceedings. The Virginia court considered the *International Shoe Company Case* as deciding otherwise and upheld the validity of the service of process in the present case. Appellants assert that that case is clearly inapplicable to the facts of the instant case.

(3) *International Shoe Co. v. Washington*, 326 U. S. 310.

The defendant, International Shoe Company, had no office or regular place of business in the State of Washington but maintained there a number of agents *who not only solicited orders in the state but also demonstrated and exhibited the company's products from place to place.* An action was brought by the State of Washington to compel the payment of unemployment insurance taxes levied by it, which were based on the compensation earned by the companys' agents *while working in that state and paid to them there.* Process was served personally on one of these agents of the company *and also* by mailing notice of the proceeding to the defendant at its principal office in Missouri by registered mail.

The decision of this court in holding that the requirements of due process had been fulfilled was therefore based on the activities of the company's agents *actually present in the state*. The court stated that the general requirements of due process may be satisfied by sufficient "minimum contacts" with a state so that "the maintenance of the suit there does not offend traditional notions of fair play and substantial justice." It is submitted that it was the court's clear intention that such "minimum contacts" as it referred to, were to be restricted, in the case of corporations, to the activities of *their agents actually present within the state*. This is abundantly apparent from the following quotations from the opinion in which italics have been supplied:

> "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent *within the state* which courts will deem to be sufficient to satisfy the demands of due process." (p. 317)
>
> "'Presence' *in the state* in this sense has never been doubted when the *activities of the corporation there* have not only been continuous and systematic, but also give rise to the liabilities sued on, . . ." (p. 317)
>
> "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents *in another state*, is a little more or a little less". (p. 319)
>
> "But to the extent that a corporation exercises the privilege of conducting activities *within a state*, it enjoys the benefits and protection of the laws of the state". (p. 319)
>
> ". . . so far as those obligations arise out of or are connected with the activities *within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (p. 319)

As will be developed in the following section of this brief, the Appellants in the present case have never been physically present within the State of Virginia and have never done business there or had an agent or representative of any kind present there. Accordingly they cannot fairly be said to have had the necessary "minimum contacts" with Virginia to justify constructive service of process in the present case under authority of the *International Shoe Company Case*.

(4) *Appellants Have Had No Minimum Contacts with Virginia.*

In its effort to bring the present case within the "minimum contact" rule of the *International Shoe Company Case*, the Virginia court found that Appellants (1) had *solicited* new members there through its present members, (2) had *consummated* membership contracts there, (3) had *investigated* claims in Virginia, and (4) had *discharged* the obligations of the Association there. Neither the Virginia Commission in its opinion supporting the order here appealed from nor the Attorney General of Virginia, either orally or in his brief on behalf of the State before the Virginia Supreme Court of Appeals, asserted that any of these activities took place in the State.

The Commission, in the *order* instituting this proceeding, stated:

> ". . . that the said Travelers Health Association appears to be an insurance company doing in Virginia *only a mail order business which is not required to obtain a license under the Virginia Insurance Laws*, . . ." (R. 7) (Italics supplied)

The Commission also in its *opinion* stated that:

> "Since the *activities* complained of were *by mail and beyond the limits of the State* . . ." (R. 19) (Italics supplied)

the order of summons in compliance with the statute directed that jurisdiction be had by service of process by registered mail.

It is also stated in the Commission's *opinion*:

> "There has been no effort to deny that the respondents, *through medium of the mails from beyond the limits of the State*, have offered for sale, advertised for sale, or otherwise promoted or assisted, participated in or acted in furtherance of the offer, advertisement and/or sale of membership certificates constituting contracts of insurance . . . within this state, to residents of this state. . . ." (R. 19) (Italics supplied)

Again the Commission pointed out in its *opinion* that Appellants:

> ". . . are not charged with doing business in Virginia but with offering and advertising for sale and promoting the sale of insurance in Virginia *by mail* and the action is to foreclose them from *these* activities." (R. 20) (Italics supplied)

It is therefore apparent that there is no basis in fact for the finding by the Virginia Court of Appeals that "The State Corporation Commission concluded that the *foregoing activities* (referring to those dealt with in the Court's opinion but not considered or in any manner dealt with by the Commission) were such as to constitute violations of the Virginia Securities Act and to bring them within the jurisdiction of the State." (R. 35) On the contrary, as appears from the foregoing extracts from the Commission's order and opinion, it predicated its conclusion *solely* upon the fact that Complainants conducted "the activities complained of . . . *by mail from beyond the limits of the State*." (R. 19)

We are confident that counsel for Appellee will not con-

trovert the statement that the Attorney General of Virginia, neither orally nor in his brief on behalf of the State before the Virginia Supreme Court of Appeals, asserted or relied upon the fact that any of the so-called "activities" discussed in the opinion of the Supreme Court of Appeals were relied upon by him in support of the State's jurisdiction over Appellants.

The fact that the Virginia Court found it necessary to base *its* decision on the alleged happening of activities in Virginia is a strong indication, however, of its indirect adherence to the principle that the transmitting of interstate mail into a state is not of itself sufficient to justify constructive service of process.

Appellants assert however that they have conducted no activities in Virginia which would constitute the necessary "minimum contacts" with Virginia within the meaning of the decision in the *International Shoe Company Case* and there is no basis in the record for the finding by the Virginia Court that the above listed activities occurred in Virginia. Appellants submit that they are justified in asking this Court to make these findings of the Virginia Court the subject of inquiry under the long recognized exception to the general rule in this regard, which is succinctly stated in *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389 (1924):

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. . . . To this general rule there are two equally well settled exceptions: '(1) *Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it*, and (2) *where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*'" (p. 394) (Italics supplied).

To the same effect see also *Truax* v. *Corrigan*, 257 U. S. 312, 324-325 (1921); *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593 (1915); *Wood* v. *Chesborough*, 228 U. S. 672, 678 (1913); *Crescent* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912); *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591 (1912).

(a) *Solicitation of new members.*

The Virginia Court found that Virginia members assisted in procuring new members in Virginia for which activity the Appellants were responsible, and concluded that such activity, together with the three other activities mentioned above, constituted such "minimum contacts" as were necessary to fulfill the due process requirements defined by this Court in *International Shoe Co.* v. *Washington*.

The only references to the activities of members of the Association in the agreed statement of facts are in Paragraphs 6 and 7* which provide that the names of the prospects for memberships were sent by old members by mail to Appellants in Omaha and that the *letters of solicitation were sent directly by mail to the prospects from Omaha*. The significant point overlooked by the Virginia Court is that this activity of the old members, who had no authority to obligate Appellants, was wholly voluntary, and *was limited solely to the submission of names of prospects to the Association*. In support of its conclusion the Virginia Court stated that the literature was sent to members of the Association which was in effect an implied invitation to members to solicit new members. This literature, samples of which are among the original exhibits filed with the record in this case, was mailed by Appellants only to *pros-*

* See p. 7, *supra*.

pective members and not to *actual* members and *could not therefore constitute such an implied invitation to members.* Assuming, however, that this literature could be construed as an implied invitation to prospective members to solicit new members if and when they became members, such an interpretation of the exhibits is directly contrary to paragraph 2 of the agreed statement of facts.* Certainly the voluntary act of sending a friendly letter suggesting someone's name (not necessarily a resident of Virginia) for membership in the Association does not constitute a business activity on the part of the Association, especially in view of the agreed statement of facts upon which the case was tried. In any event the statement of the Baltimore member in the letter printed on the reverse side of the guarantee slip, which is one of the original exhibits and which was referred to by the Virginia Court (R. 33), is contrary to the stipulation and does not constitute evidence of the activities of the Association's Virginia members.

Appellants contend that the case of *Minnesota Commercial Men's Assoc.* v. *Benn, supra,* is decisive of this aspect of the case, as this Court there held that solicitation by members of a similar association without authority to obligate it in a state in which the association was not domesticated was not such an activity as to subject the association to the jurisdiction of that state. The Court there said:

> "We think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference

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* Paragraph 2 of the Stipulation of Facts provides that:

> "The Travelers Health Association has not now, nor has it ever had any office, officer, official, agent, representative, bank account nor any other real or personal property, tangible or intangible, located in the State of Virginia." (R. 11)

that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.' " (p. 145)

See also, *Rausch* v. *Commercial Travelers Mutual Accident Association*, 38 Fed. (2d) 766 (C.C.A. 8th, 1930) (cert. den. 281 U. S. 763); *Sasnett* v. *Iowa State Traveling Men's Ass'n*, 90 Fed. (2d) 514 (C.C.A. 8th, 1937); and *Oliver* v. *Iowa State Traveling Men's Ass'n*, 76 Fed. (2d) 963 (C.C.A. 8th, 1935).

(b) *Consummation of membership contracts.*

The Virginia Court likewise was in error in concluding that the membership contracts were consummated in Virginia. The Virginia Court based its conclusion on the provisions in the sample membership certificate or agreement, which is an original exhibit filed with the record, that such certificate was issued in Omaha "subject to approval of applicant." The agreed statement of facts herein provides that every applicant "is elected to membership in the offices of the Association in Omaha", and that in each case the new member "receives by mail from Omaha, Nebraska . . . a membership certificate"*. Each certificate, therefore, goes into effect when issued, and *the member's insurance coverage begins at that moment*. It is true that the certificate is subject to cancellation by the new member if, within ten days after its receipt, he decides he does not want it; *but during this ten day period until the certificate is actually cancelled, the applicant is covered by the insurance protection the certificate affords*. Appellants submit that the act of a member in exercising his right to cancel the membership agreement after receiving it does not, therefore, constitute

* See p. 6, *supra*.

a part of the actual *consummation* of the contract and cannot fairly be said to be an activity of the Appellants.*

(c) *Investigation of claims.*

It is submitted that a reasonable interpretation of the stipulation of facts and the exhibits upon which this case was heard does not justify the conclusion of the Virginia Court that the Appellants had made *investigations* with respect to the validity of claims asserted against them arising in Virginia. The record is silent both as to the place and method of the investigations referred to in the stipulation, and it is respectfully submitted that it was sheer speculation on the part of the Virginia Court to conclude that such investigations constituted an activity of the Appellants in Virginia. The statement in paragraph 9 of the stipulation that the corporate Appellant "has caused many claims to be investigated"** is perfectly clear in this respect when read in the light of the language of paragraph 2 of the stipulation of facts, which is as follows:

> "Travelers Health Association has not now; nor has it ever had, any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia." (R. 11)

Obviously under the stipulated facts the Association could not itself have made the investigation because it never had any agent *or representatives* in Virginia.

The Virginia Court in discussing the activities of Appellant (R. 30-43) avoided any mention of the word "repre-

* In the brief filed in the Supreme Court of Appeals of Virginia on behalf of Appellee it was admitted at page 2 that the "actual contract of insurance is made in Nebraska."

** See p. 7, *supra*.

sentative" when referring to paragraph 2 of the stipulation. It is submitted that "representative" as used in the stipulation in conjunction with the words "office", "official" and "agent" leaves no doubt that the corporate Appellant has had no one in Virginia at any time performing any activities for it who could be said to be "investigating" claims, and the finding of the Virginia Court to the contrary is unwarranted.

(d) *Discharge of claims.*

The Virginia Court likewise was in error in concluding that the payment and discharge of claims of Virginia members by forwarding checks to them there through the interstate mails from Omaha constituted a Virginia activity. Such a finding is not only contrary to any fair and reasonable interpretation of paragraph 9 of the stipulation of facts, the pertinent sentence of which is "Payment of claims have been made by mail from the home office in Omaha",* but it is also inconsistent with the decisions of this Court in *Minnesota Commercial Men's Assoc.* v. *Benn*, *supra*, and *Hunter* v. *Mutual Life Insurance Co.*, *supra*. See also *Kasel* v. *Milwaukee Employees Pension Assoc.*, 221 N. W. 21 (Minn. 1928).

The checks when received by the Virginia claimant's are not accepted in absolute payment or discharge of the obligations but only on condition that they be paid when forwarded to a collecting bank in Omaha by the claimants' banks in Virginia. Such claims therefore are actually discharged in Omaha and the finding of the Virginia Court to the contrary finds no support in the record and is inconsistent with the applicable legal principle as to the actual discharge of a claim paid by check. *Segrist* v. *Crabtree*, 131

* See p. 7, *supra*.

U. S. 287 (1889); *McRae Grocery Co.* v. *Independence Indemnity Co.*, 33 Fed (2d) 494 (C.C.A. 4th, 1929).

Appellants submit that the Virginia Court was therefore in error in finding that they or either of them had (1) solicited new members within the state, (2) had consummated contracts of membership there, (3) had investigated the validity of claims in Virginia, or, (4) had discharged claims in Virginia.

Appellants further submit that the record discloses no activities of the Appellants in Virginia and that they, therefore, have not had the requisite "minimum contacts" with the State and may not constitutionally be subjected to the *in personam* jurisdiction of the Virginia Court by constructive service of process sent to them outside the State. When confronted with almost the identical situation in *Minnesota Ass'n* v. *Benn*, *supra*, this Court stated:

> ". . . an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. . . .
>
> "We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment." (p. 445)

There is, therefore, no basis in fact or in law for the finding of the Virginia Court that, because of certain alleged "minimum contacts" of Appellants with the State of Virginia, the requirements of due process clause of the Fourteenth Amendment could be and were in fact complied with in the instant case by giving to them notice by registered mail of the institution of this proceeding.

B.

DUE PROCESS REQUIREMENTS THE SAME FOR CIVIL AND CRIMINAL PROCEEDINGS.

The Virginia Court, in sustaining the validity of the constructive service of process authorized by Section 6 of the Securities Act, sought to distinguish *Minnesota Commercial Men's Ass'n* v. *Benn, supra*, and similar cases, on the ground that they involved pecuniary civil judgments while the present proceeding was *quasi* criminal in nature. The Court cited *Merrick* v. *Halsey & Co.*, 242 U. S. 568 (1917); *International Harvester Co.* v. *Kentucky, supra*; *In re Palliser*, 136 U. S. 257 (1890), and *United States* v. *Steinberg*, 62 Fed. (2d) 77 (C.C.A. 2d, 1932) (cert. den. 289 U. S. 729), in support of this alleged distinction in due process requirements.

Before discussing the conclusions of the Virginia Court in this respect, it is of interest to note that the Commission took no such view of the nature of the proceeding. On the contrary, it was at pains to point out that the sections of the Securities Law, making violation of the Commission's orders a crime and imposing appropriate penalties (Sections 15 and 17),* had no application to the proceedings and held that Section 6 of the Law under which it was being conducted was remedial in its purpose and not criminal in it objective. (R. 23)

Appellants submit, however, that the due process requirements of the Fourteenth Amendment are the same for both civil and criminal proceedings, and that the above cases relied upon by the Virginia Court are not to the contrary. In *Merrick* v. *Halsey & Co.*, *supra*, several plaintiffs attacked the constitutionality of the Blue Sky Law of Michigan, all but one of whom were residents of or doing busi-

* See footnote p. 4, *supra*.

ness in Michigan. The remaining plaintiff was an out-of-state brokerage partnership which had no agent in the state and had not otherwise been present there, but sold securities there by interstate mail. This plaintiff, however, made no issue of its absentee status with respect to the State of Michigan, *but to the contrary alleged in its pleadings that it was in like situation with the other plaintiffs. Accordingly, there was no issue as to the validity of service of process involved and there is no reference in the opinion to any distinction between the due process requirements of civil and criminal proceedings.*

International Harvester Co. v. *Kentucky, supra*, involved a criminal proceeding, but process was served on an agent of the defendant *physically present* in the state of the forum who was not only a soliciting agent but also had authority to settle claims. The court in sustaining the validity of the service of process made no distinction between civil and criminal proceedings.

In re Palliser, supra, and *United States* v. *Steinberg, supra*, are similar cases involving criminal prosecutions in courts of the United States for violations of Federal statutes in which the courts had, in a manner not disclosed in the opinions, acquired actual physical jurisdiction of the defendants who were charged with having committed crimes in the districts in which they were being prosecuted from points outside those districts. The cases, therefore, involve situations wholly different from the case at bar and there was no issue as to the validity of the process and no distinction was drawn between the due process requirements in criminal and civil proceedings.

Assuming that the proceeding in the present case was properly classified by the Virginia Court as criminal or *quasi* criminal in nature, Appellants, nevertheless, may not be prosecuted *in absentia* in such a proceeding without valid service of process, for it is universally recognized that in

order that a crime be constitutionally prosecuted and judgment rendered it is necessary that a court have jurisdiction (a) over the offense and (b) *over the person of the accused.* See 14 American Jurisprudence (Criminal Law), Section 214. Merely because Virginia declares the sending of communications to its citizens through the mails from outside of the State to be a crime does not establish its jurisdiction to adjudicate the innocence or guilt of the alleged offenders. Therefore, unless and until Virginia actually obtains such jurisdiction over their persons by valid service of process and/or arrest within the State, or by extradition, it cannot constitutionally convict Appellants of the offense alleged to be involved in this proceeding.

In *Strassheim* v. *Daily*, 221 U. S. 280 (1910), Mr. Justice Holmes emphasized in the following language the distinction between jurisdiction over the offense and over the person of the defendant and the necessity of having both in a criminal proceeding:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, *if the State should succeed in getting him within its power.*" (p. 285) (Italics supplied)

The Virginia Court apparently recognized the necessity of acquiring personal jurisdiction over Appellants here, for it asserts that Virginia could acquire such jurisdiction over Appellants by means of extradition, and reasons that since the state had this power it was justified in conducting the proceeding in question which it held to be analogous to a preliminary hearing in an ordinary criminal case. It is submitted, however, that the present proceeding was far more than a preliminary hearing since it involved a judicial determination that Appellants were in violation of the Securities Law and resulted in a final *in personam* judg-

ment against them. In any event, the Virginia Court is indeed credulous if it believes that the Governor of the State of Nebraska could be persuaded to grant extradition to Virginia of a Nebraska corporation and a Nebraska individual enjoying the highest reputation and standing in that state for the performance in Nebraska, under the supervision and approval of the insurance commission of that state, of acts entirely lawful there.

Since there is no reasonable justification for the assumption that Virginia could acquire jurisdiction over the person of the Appellants through extradition proceedings, and since neither of the Appellants have conducted any activities whatever in Virginia nor been present or otherwise done business there to such an extent that they can be said to have had the necessary "minimum contacts" with Virginia and thereby warrant constructive service of process, the fundamental rights of due process guaranteed to the Appellants by the Fourteenth Amendment have been violated flagrantly by the final order of the Virginia Commission of January 5, 1948, and that order and Section 6 of the Securities Law should therefore be declared unconstitutional and void. A decision to the contrary permitting Appellants to be subjected to the jurisdiction of the State of Virginia for the purpose of such a judicial proceeding would go far beyond the decision in the *International Shoe Company Case* and would establish the principle that the mere act of sending letters into a state through the mail constitutes the necessary "minimum contacts" with a state so as to meet the due process requirements of an *in personam* proceeding against the offenders. Manifestly such a principle is undesirable and unnecessary and would tend to weaken the Federal union by destroying the independence of the several states and their citizens against the jurisdiction of the courts of other states.

II.

Invalidity of Attempt to Control Appellants' Activities Beyond the State's Borders

Aside from the question of the validity of the service of process in the present case, Appellants assert that Section 6 of the Securities Law as applied to them also violates the due process requirements of the Fourteenth Amendment in attempting to regulate and control their activities occurring beyond the borders of Virginia which are lawful where they occur. Thus, even assuming that Virginia could obtain valid service of process on Appellants, they submit that the state may not validly control and regulate their lawful activities in Nebraska. *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346 (1922); *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426 (1926); *Compania General deTabacos* v. *Collector of Internal Revenue*, 275 U. S. 87 (1927).

Appellants are aware of the recent decisions of this Court in *Osborn* v. *Ozlin*, 310 U. S. 53 (1940) and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943), which in effect approve state control of out-of-state activities of foreign insurance companies on the grounds that the state has a legitimate interest in the activities in question. It is significant to note, however, that each of these cases involved parties *that were admittedly licensed to do business in the state of the forum and were actually doing business within the state*, whereas in *Allgeyer* v. *Louisiana*, *supra*, and the line of cases cited above, the defendants were neither licensed to do business in the state of the forum nor conducting any business within the state's borders. It is submitted that this is a critical distinction which should be decisive of the issue here involved.

In the *Hoopeston Canning Company Case*, *supra*, Illinois

insurers who had been licensed to do business in New York for a great many years, insured immovable property located there and sent inspectors into the state from time to time before and after the consummation of each contract of insurance. In *Osborne* v. *Ozlin, supra*, the statute under consideration applied only to insurance companies "legally authorized to do business" in the State of Virginia.

In *Compania General deTabacos* v. *Collector of Internal Revenue, supra*, however, the defendant, whose activities the court held were not subject to the jurisdiction of the Philippine Court, was a foreign insurance company not licensed to do business or otherwise transacting business in the Philippine Islands, and in the *Tafoya Case, supra*, where the defendant was licensed to do business in New Mexico, a statute of that state was struck down as exceeding the State's power because it applied to activities of insurance companies in other jurisdictions. Likewise, in the *St. Louis Colton Compress' Company Case, supra*, an Arkansas statute was held invalid which sought to collect the discount on gross premiums paid by the defendant upon insurance on its property in Arkansas to companies not authorized to do business in the state since the policies involved had been contracted for, paid for and delivered in Missouri. Finally, in *Allgeyer* v. *Louisiana, supra*, a Louisiana statute which sought to regulate the activities of a foreign insurance company by penalizing Louisiana residents for doing business with that company out of the state by the use of the United States mails, was held invalid.

Mr. Justice Frankfurter, in *Osborn* v. *Ozlin, supra*, has stated in particularly apt language the issue here raised:

> "It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern

because the Constitution has placed control elsewhere." (p. 62)

The principle which Appellants assert is applicable here was stated by Mr. Justice Holmes in referring to the *Allgeyer Case* in *St. Louis Cotton Compress Company* v. *Arkansas, supra*, as follows:

> "The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State *but it cannot regulate or interfere with* what they do outside . . . ." (pp. 348-349) (Italics supplied)

In the earlier case of *New York Life Insurance Company* v. *Head*, 234 U. S. 149 (1914), the court recognized this principle in the following language:

> ". . . it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." (p. 161)
>
> * * * *
>
> ". . . the Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed." (p. 164)

Likewise, in the more recent case of *Hartford Accident & Indemnity Company* v. *Delta & Pine Land Company*,

292 U. S. 143, (1934), this Court reaffirmed the principle recognized in the *Head Case* in declaring that a state:

> ". . . cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York Life Ins. Co. v. Head, 234 U. S. 149; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Insurance Co. v. Dick, 281 U. S. 397, 407-8." (p. 149)

Appellants respectfully submit that since they have conducted no business in Virginia and have never been present or otherwise done business there, the principle of the *Allgeyer* line of cases is applicable here and that there is no justification for the extension to the case at bar of the doctrine of the *Ozlin* and *Hoopeston Canning Company Cases*.

III.

CONCLUSION

Appellants wish to emphasize that they do not question the power of Virginia to regulate and control insurance companies to the extent that they or their agents do business within its borders. Nor do Appellants question the validity of the Securities Law to the extent that it provides that individual and corporate residents of other states shall not come into the State for the purpose of doing business there without first submitting to the regulatory authority of the State. Nor would Appellants question the legal propriety of reasonable public notice to the citizens of Virginia of the fact that an undomesticated corporation had not submitted to the

regulatory authority of the State regardless of whether the corporation could be compelled to submit to that authority or not. Appellants, however, earnestly deny the constitutional authority of Virginia, by legislative enactment, to require the corporate Appellant herein to submit to the regulatory authority of the State before continuing its interstate business by mail with Virginia citizens, and, upon its rightful refusal so to submit, to conduct an *in personam* judicial proceeding in the State against both Appellants based solely on constructive service of process by registered mail sent outside the State, in which the Appellants made no general appearance and which resulted in a permanent injunction being issued against them. This, it is submitted, is an unwarranted, unjustified and unconstitutional extension of the State's power in clear violation of the requirements of both legislative and judicial due process.

Appellants submit that the approval of such statutes as Section 6 of the Securities Law is not necessary *to enable the states properly to protect their citizens for they can be afforded reasonable protection by public notice of the corporations which are either not subject to the states' regulation, or which are not for any reason being regulated by it.* If further regulation and control of such corporations, as the corporate Appellant here, is deemed necessary or desirable in addition to that of the state of incorporation, it should properly come from the Federal Government which has heretofore, by the Securities Act of 1933 and subsequent similar legislation, supplemented the securities laws of the various states to the extent of providing for a full disclosure in connection with the issue and sale of certain types of securities (not including contracts of health insurance) flowing in interstate commerce by the use of the United States mails or otherwise. These Federal laws were admittedly enacted because the states were powerless to control this type of activity. See 47 American Jurisprudence

(Securities Act), Section 1, and *Securities and Exchange Commission* v. *Wickham*, 12 F. Supp. 245 (D. Ct. Minn. 1935). See also *Charles Hughes & Co.* v. *Securities and Exchange Commission*, 139 Fed. (2d) 434 (C.C.A. 2d, 1943).

It is manifest that the determination by the Congress of the necessity for these laws was a recognition of the constitutional limitation which prevented the several states from exercising effective control over the issue and sale of securities by mail in interstate commerce. It is precisely the same constitutional limitation which renders Section 6 of the Securities Law unconstitutional as applied to Appellants in this case.

It is therefore respectfully submitted that the decision of the Virginia Supreme Court of Appeals, in upholding the final order of the State Corporation Commission of January 5, 1948, and sustaining the constitutionality of Section 6 of the Securities Law, should be reversed and the statute declared unconstitutional and void as applied in the instant case.

Respectfully submitted,

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Dated: October 14, 1949.

APPENDIX

SECTION 6 OF THE VIRGINIA SECURITIES LAW AS AMENDED BY THE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, 1932.

CHAP. 236.—An ACT to amend and re-enact section 6 of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain "securities" herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March 23, 1918, as heretofore amended.

[S. B. 335]

Approved March 23, 1932

1. Be it enacted by the general assembly of Virginia, That section six of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain "securities" herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia, as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March twenty-third, nineteen hundred and eighteen, as heretofore amended, be amended and re-enacted so as to read as follows:

Section 6. The State corporation commission shall have jurisdiction at the instance of any resident of this State,

upon affidavit by such resident duly sworn to, or of its own motion, and upon such facts and established in such manner, as required in a court of equity, for purposes of an injunction, after at least five days' notice to the party defendant and an opportunity to be heard, said notice to be accompanied by a statement of the facts and charges upon which action is proposed, to issue a cease and desist order in the nature of a temporary injunction and restraining order in the matter of and against any person, firm, corporation, society, or association, which it appears from the facts is offering for sale, advertising for sale, or otherwise promoting or assisting, participating in or acting in furtherance of the offering, advertising, selling or otherwise promoting any securities or land which should be qualified and which are not, and/or in any case in which it appears that a fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted in connection with the disposition or attempted disposition of securities, or out of State land, to the public, whether the provisions of this act as to qualification or notification apply or not, and even though one or more of the exemptions or exceptions under this act should be applicable, and even though qualification or registration under the provisions of this act has been effected, enjoining and restraining such person, firm, corporation, society or association, from further offering, advertising, selling, or promoting, assisting or participating in or acting in furtherance of such offer, advertisement, or sale and if said cease and desist order is issued, it shall thereafter proceed as soon as may be after due notice and after a full hearing on the merits to consider and determine whether or not such cease and desist, or restraining order, and injunction shall be dismissed or made permanent, and its action, subject to right of appeal, shall be conclusive in any court in the State in any matter, civil or criminal upon

the same state of facts. The proceeding shall be analogous to and in accordance with proceedings in equity for injunctions, except as otherwise specifically provided, and the commission in this connection shall have power and authority to require a bond with surety in accordance with the principles applicable in the courts of equity of this State, and it shall have power and authority to exercise a sound, judicial and equitable discretion in the administration of these and all other provisions of this act with a view to the accomplishment of that measure of protection to the public contemplated by this act with as little interference with legitimate business as is consistent with the accomplishment of the objects of this legislation.

In any case in which it is made to appear, or the commission has reason to believe from facts before it, that a proceeding should be instituted to determine whether a cease and desist order or injunction should issue in accordance with provisions of this section and service upon the person or persons, firm, corporation, society, association, or any agent or representative cannot be had because the offering is by advertisement and/or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State, or the person or persons who appear to have personally violated the law within the limits of the State have left the jurisdiction of the State temporarily or permanently, or the original and at least one alias process have been returned not found, jurisdiction may be obtained through the medium of at least ten days' notice instead of five by registered mail, return receipt demanded, to the address or addresses of such person or persons, firms, corporation, society or association insofar as such address or addresses shall be known or shall be available or by publication of notice in a newspaper published in the city of Richmond of general circula-

tion in the State, beginning at least ten days prior to the date set for hearing, and in case of nonappearance in response to such notice, or in case of special appearance, and after full hearing upon the merits, the commission may issue a cease and desist order, in the nature of a temporary injunction, and/or a permanent injunction, in accordance with the preceding provisions of this section where service is had or general appearance is made, and forward by registered mail, return receipt demanded, attested copies of such order to the same addresses or such later addresses as may become known and give such other publicity as it may see fit, and in case no addresses were known or shall have become known such publicity as the commission may see fit shall be given to such order, including notice in either case to the public through the press or otherwise as the commission may, in its discretion, determine to be advisable for the reasonable information and protection of the public.

The provisions of this section, as amended, are subject to the following provisos: Nothing herein shall be construed as being applicable, as an offeror, solicitor, or advertiser of any securities or out of the State land to the publisher of any newspaper or periodical admitted to second class mailing privileges under the United States postal laws except and until the notice provided for in section two hereof shall have been given by the commission, and further, nothing herein shall be construed, so as to, in any way, impair, or infringe upon the right of any citizen or resident, natural or corporate, or person or corporation temporarily within the State of Virginia to offer, of his, her, or its own initiative, to subscribe for, order, or buy from any nonresident person, firm, corporation, or association, any security or out of the State land which any such citizen, resident or temporary sojourner may desire to subscribe for, order or buy.

Any order that may be entered as the basis of the institution of a proceeding under this section and the issuing of the at least five or ten days' notice, as the case may be, in the discretion of the commission may be kept on the secret docket and not made public until after the prelinminary or final hearing, as the commission may determine.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF AND IN HIS PERSONAL CAPACITY,
Appellants,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

APPELLANTS' BRIEF IN REPLY TO BRIEF FOR THE APPELLEE

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APPELLANTS' BRIEF IN REPLY TO BRIEF FOR THE APPELLEE

Introduction

A reading of the Brief of Appellee indicates the need of a reply in order to clarify the positions of the respective

parties both as to the facts and the law. We propose briefly to emphasize the following points:

1. Appellee does not and can not affirm the accuracy of the alleged facts upon which the Virginia Supreme Court of Appeals relied in rendering its decision.

2. Appellee presents three inconsistent views as to the nature of this proceeding and of the Order under review.

3. Appellee misconstrues Section 6 of the Virginia Securities Law as well as appellants' position regarding it.

4. Appellee misinterprets the constitutional issues presented on this appeal.

Point I

Appellee Does Not and Can Not Affirm the Accuracy of the Foundation of Alleged Facts Upon Which the Virginia Supreme Court of Appeals Relied in Rendering Its Decision

As we have pointed out in our original brief (pages 22-27) and in our Brief in Reply to Appellees Statement Opposing Jurisdiction (pages 4-7), the Court in order to sustain its decision assumed a foundation of fact directly contrary to the facts specifically stipulated by the parties. Although in Appellee's Brief the Attorney General (pages 5-7) now refers to the facts as found by the Virginia Court, he very carefully refrains from asserting even indirectly the accuracy of such facts. He could not in good conscience do otherwise because he knows that the facts contained in that opinion do not come within the stipulated facts as understood and acted upon in this proceeding by the parties thereto. As additional substantiation we point out the following:

A. In its original order instituting these proceedings the State Corporation Commission stated "that the

Travelers Health Association appears to be an insurance company doing in Virginia only a mail-order business * * * " (R. 7).

B. In Appellee's Brief on this appeal there appears the following significant statement: "The fact that *neither the appellants nor their agents are present in Virginia* is not material." (Appellee's Brief 14), (Emphasis supplied).

C. In his Brief before the Virginia Court the Attorney General at page 2 conceded that the "Actual contract of insurance is made in Nebraska."

D. In its opinion the State Corporation Commission made the following statement of fact (R. 20): "Respondents rely on the fact that their contacts with citizens of Virginia are by mail, that they are not doing business in Virginia, and that they do not enter Virginia either personally or by agents * * * *They are not charged with doing business in Virginia* * * *"* (Emphasis supplied).

In passing, we submit that since the State Corporation Commission concedes that appellant is not charged with doing business in Virginia, the fundamental basis upon which the State of Virginia, has attempted to obtain jurisdiction through service of process by mail falls of its own weight.

Point II

Appellee Presents Three Inconsistent Views As To the Nature of This Proceeding and of the Order Under Review

In discussing the nature of this proceeding and of the Order under review, appellee asserts three inconsistent and contradictory positions, *First* that the Order is purely di-

rectory with no binding effect upon appellants, and that therefore service neither of process nor even of notice was required in order to permit the making and entry of the order (Appellee's Brief, 22, 23). *Second*, the interpretation made by the Supreme Court of Appeals that "the inquiry is quasi criminal in its approach" (R. 36); and *Third*, the New Jersey position advanced in the case of *Wilentz* v. *Edwards*, 134 N. J. Equity 522, that the Court can issue an injunctive restraining order after substituted service and that whether or not contempt proceedings would thereafter lie for violation of the order need not be determined until a violation has occurred (Appellee's Brief, 25, 26).

Appellee does not directly assert the validity of the position taken by the Virginia Court that the proceeding is quasi criminal in nature. It is obviously embarrassing in one breath to assert that effect of a proceeding with an ensuing restraining order has no more weight or binding effect that a notice published in the paper, and in the next breath to assert that the proceeding and order are quasi criminal in nature and that the defendants are therefore fortunate that instead of indictment and extraditement a more benign proceeding involving only civil process was substituted (R. 39, 40).

The proceeding can not be "merely directory" and at the same time "quasi criminal". Appellee therefore seems to adopt the "merely directory" theory, but at the same time cites the authorities used by the Virginia Court in discussing the criminal nature of the proceeding (Appellee's Brief 15-19, R. 36, 38, 39). The statute by its terms provides that "the proceeding shall be analogous to and in accordance with proceedings in equity for injunctions", (Appellants' Brief Appendix 40) and it is generally recognized that injunctive orders in equity are not merely "directory"

but are definitely so mandatory and in personam as to require personal service of process within the jurisdiction.

Freeman v. *Alderson*, 119 U. S. 185, 187-189;

Indemnity Insurance Co. v. *Smoot*, 152 Fed. (2) 667, 670 (Cert. denied 328 U. S. 835);

Hart v. *Sansom*, 110 U. S. 151, 155;

National Bond and Investment Co. v. *Gibson*, 6 Fed. (2) 288, 290 (Cert. denied 273 U. S. 668);

National Surety Company v. *Austin Machinery Co.*, 35 Fed. (2) 832, 833, 844 (Cert. denied 280 U. S. 614).

In *Freeman* v. *Alderson*, this Court declared the law regarding personal service of process to be as follows:

> "For any further adjudication, the defendant must be personally served with citation or voluntarily appear in the action. The laws of the state have no operation outside of its territory except so far as may be allowed by comity; its tribunals can not send their citations beyond its limits and require parties there domiciled to respond to proceedings against them; and publication of citation within the state can not create any greater obligation upon them to appear."

Again in *Indemnity Insurance Company* v. *Smoot* certiorari was denied after the Circuit Court had said at page 670:

> "But by tradition equity is said to act only in personam and this principle is of nearly universal application".

In *Hart* v. *Sansom*, the Court at page 155 declared, when referring to a proceeding in equity:

> "Such a decree being in personam merely can only be supported against a person who is not a citizen or resident of the state in which it is rendered by

> actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient".

When referring to cases involving exercise of police power against an individual the Circuit Court of Appeals in *National Bond and Investment Company* v. *Gibson*, said:

> "* * * It is the punishment and prevention of crime against which the police power of the state is directed. In all such cases the defendant is looked upon as the wrong-doer, the party to be punished, and all such actions are actions in personam".

Certiorari was thereafter denied (273 U. S. 668).

The least justifiable position is the third one. It seems elementary that the liberty and property of any person have been invaded when an order is entered enjoining and restraining activities constituting his regularly established business and that it is no answer to say that whether the order is enforceable need be determined only after it has been violated. He should not be required at his own risk by a continuation of his business activities to ascertain whether he is or is not subject to punishment for contempt, or to fine and imprisonment. Especially is that true when the statute provides, as does the one under review, that the action of the State Corporation Commission "shall be conclusive in any court in the State in any matter civil or criminal upon the same state of facts" (Appellants' Brief, Appendix 40).

Point III

Appellee Misconstrues Section 6 of the Virginia Securities Law As Well As Appellants' Position Regarding It

Appellee at page 13 of its Brief, concedes that there is no suggestion that the membership certificates issued by the appellants were fraudulent, misleading or inferior,

but says "That is not the question". It then continues: "While the securities may be entirely satisfactory, their contention that they are not subject to supervision by Virginia because of the manner in which they do business would be just as valid if applied to the most unsatisfactory and worthless securities".

What appellee has overlooked is the wording of the statute itself which is sought to be enforced. We submit that a proper reading of Section 6 of the Virginia Securities Law permits "a cease and desist order in the nature of a temporary injunction and restraining order" only where, as one of the elements in connection with the sale or promotion of securities "it appears that a fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted in connection with the disposition or attempted disposition of securities" (Appellants' Brief, Appendix 39).

It is our position that whatever interpretation may be placed upon this Statute the Commonwealth of Virginia has in no event the constitutional authority to prohibit the appellants from performing in Nebraska their proper and customary business activities which, pursuant to the supervision and regulation of the Nebraska Insurance Department, they have a right under Nebraska Law to perform. Hence, under the quoted limitations of Section 6, the interpretation that has been placed upon it by the State of Virginia is even more unsupportable and more clearly unconstitutional as applied to these appellants because there is no contention or even insinuation here that any fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted by these appellants. On the contrary it is conceded that appellants are reputable and that their certificates of membership are not subject to criticism (R. 1, 2; Appellee's Brief 13).

Appellee also emphasizes that "appellants admit that their membership contracts constitute 'securities' " within the meaning of the Virginia Blue Sky Law (Appellee's Brief, 3). Then at page 18 it asserts that just as federal protection of the liquor traffic has been withdrawn by the Wilson Act and the Webb-Kenyon Act, so has federal protection been withdrawn from the promotion of the sale of securities through the United States mails by means of the enactment of Title 1, Section 18 of the Securities Act of 1933 (Title 15, Section 77 of the U. S. Code Annotated).

We concede that in the Virginia Act the definition of a "security" specifically includes membership certificates, but whether such membership certificates no longer are protected in interstate commerce is dependent upon the definition of a "security" contained in the Federal Securities Act. Reference to Title 15, Section 77-b of the U. S. Code Annotated establishes that in the Federal Statute a membership certificate such as ours is *not* included under the definition of a "security". It follows that the provision of the Federal Act quoted by appellee at page 18 of its Brief does not apply to appellants' membership certificates and that they are therefore still protected in interstate commerce through the mail.

Point IV

Appellee Misinterprets the Constitutional Issues Presented on This Appeal

At page 31 of its Brief, appellee makes the following statement:

> "The appellants assert that they may illegally promote the sale of securities in Virginia by use of the mails • • • The appellants obviously wish to continue certain activities in Virginia, else they would not be complaining of an order which simply directs them not to do certain things in Virginia."

Again at page 19:

> "This is not such a case as was presented in New York Life Insurance Company *v.* Head, 234 U. S. 149, or in Hartford Accident and Insurance Company *v.* Delta and Pine Land Company, 292 U. S. 143, where one state attempted to extend the effect of its laws beyond its borders so as to destroy and impair the rights of citizens of other states to make a contract *not operative within its jurisdiction* and lawful where made."

These statements by Appellee are in direct conflict with appellants' position. Appellants assert that the State of Virginia *is* attempting to extend the effect of its laws beyond its borders so as to destroy or impair their rights as citizens of Nebraska to make contracts not operative in Virginia and lawful in Nebraska where made. They assert that their activity in securing members throughout the United States and of issuing membership certificates to them in Nebraska is entirely legal; is confined to the State of Nebraska; is not only lawful in but is supervised by the State of Nebraska; involves contracts to be carried out solely within the jurisdiction of Nebraska; and that the promotional activities which Virginia seeks to enjoin are incidental to the negotiation, consummation and performance in Nebraska of contracts between the defendant Association and its prospective members. We take the position adopted by this Court in *Connecticut General Insurance Company* v. *Johnson* 303 U. S. 77, and cases there cited, in which the Court said at pages 80-81:

> "But the due process clause denies to the state power to tax or *regulate* the corporation's property and *activities* elsewhere". (Emphasis supplied.)

It is our position therefore that the statute in question as interpreted by the order made by the Virginia Commission subjects Nebraska citizens doing business only in Ne-

braska to the process and jurisdiction of Virginia Courts and Commissions and deprives them, without due process of law, of their constitutional right to engage in lawful business within the state of their domicile.

Respectfully submitted,

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OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof and in his personal capacity,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the relation of the State Corporation Commission,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is officially reported in Volume 188 of the Virginia Reports at page 877 and is also reported in Volume 51 of the Southeastern Reporter, 2d Series, page 263. The opinion of the State Corporation Commission of Vir-

ginia has not been officially reported, but appears in the record at page 18.

GROUNDS OF JURISDICTION

The appellants challenge the validity of section 6 of the Virginia Securities Law, Chapter 529 of the Acts of Assembly of Virginia, 1928, as amended by Chapter 236 of the Acts of Assembly of Virginia, 1932, alleging it is in violation of the Fourteenth Amendment of the Federal Constitution. The appeal is pursuant to section 1257(a) of the Judicial Code and Judiciary.

STATEMENT OF THE CASE

A.

Preliminary Statement

This case is an appeal from the judgment of the Supreme Court of Appeals of Virginia affirming a cease and desist order in the nature of a permanent injunction entered by the State Corporation Commission on January 5, 1948, pursuant to section 6 of the Virginia Securities Law, enjoining and restraining the appellants from offering, advertising, promoting, or selling membership certificates or contracts of indemnity or insurance in Virginia unless and until a permit or authorization so to do shall have been issued by the State Corporation Commission as required by the Securities Law.

B:

The Statute

This appeal raises the question of the validity of certain provisions of the Virginia Securities Law or what is gen-

erally known as the Virginia Blue Sky Law (Acts of the General Assembly of Virginia, 1928, Chapter 529, page 1373, and Acts amendatory thereof; Sections 3848(47) to 3848(66) inclusive of Michie's 1942 Code of Virginia). This statute requires every person, association or corporation desiring to engage in Virginia in the selling, promotion or offering for sale securities covered by the statute to apply for a permit so to do. Certain conditions must be complied with before a permit is issued; the applicant is required to provide detailed information with reference to the securities and the solvency of the issuer of the securities and other matters relating to the propriety of their sale; and the State Corporation Commission of Virginia is authorized to conduct such investigation as it may deem appropriate and to see to the proper application of the proceeds from the sale of the securities. In general, the statute contains provisions similar to those usually contained in the "Blue Sky" laws of the various States. The appellants admit that their membership contracts constitute "securities" within the meaning of the law. (Appellant's brief, page 4). The appellants do not claim that they have applied for or secured the required permit to sell or offer their securities for sale in Virginia or that they have complied with the conditions required before such a permit can be issued.

Section 15 of the Act (Michie's Code, section 3848(61)) provides that any person violating the Act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a fine or confinement in jail, or both. Proceedings to enforce the penalties provided by this section for such violations must be instituted by indictment or information in the appropriate courts of record of the State.

Section 6 of the Act, as amended by Chapter 236 of the Acts of Assembly of Virginia of 1932, (Michie's Code, section 3848(52)) authorizes the State Corporation Commission, upon its own motion, or upon complaint of any resident of the State of any violation of the Act, to issue a cease and desist order in the nature of a temporary and/or permanent injunction and restraining order against further violations, after at least ten days notice, by registered mail to persons, corporations or associations upon whom personal service can not be had because of absence from the State. Signed receipt of the registered notice is required to be returned by the postal authorities. It is this section 6 of the Act, which is set out as an appendix to appellants' brief, under which the proceedings here involved were brought, and it is this particular provision of the Virginia Securities Law which the appellants contend is invalid.

Section 17 of the Act authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the Act.

C.
The Facts

In the Statement of the Case contained in the appellants' brief there is no mention of certain facts found by the Supreme Court of Appeals and relied upon by it in holding that the appellants had brought themselves within the regulatory jurisdiction of the Commonwealth of Virginia. Nor do the appellants there mention the evidence, which is contained in the exhibits introduced in evidence, upon which those factual conclusions are based, though in their argument they devote nine pages of their brief to a contention that the evidence does not support the decision of the Vir-

ginia Court upon these factual matters. We will set out here the facts relied on by the Court below.

The Travelers Health Association is a non-profit membership association incorporated under the laws of Nebraska, with its home office in Omaha. Letters and other exhibits filed in the case show that the appellant, R. E. Pratt, a resident of Omaha, is the Treasurer of said association and conducts its correspondence soliciting new membership contracts, which contracts provide health insurance protection. The association has not now, nor has it ever had, any office, officer, or agent, or any bank account or property located in Virginia. At the time of the hearing of this case it had in force in Virginia approximately eight hundred membership certificates, which provided health insurance protection in the form of sickness benefit payments. The association has caused many claims asserted by its Virginia members to be investigated in Virginia. (The appellants question the finding of the Supreme Court of Appeals of Virginia that such investigations took place in Virginia, but, if investigations of claims on Virginia risks took place, as was admitted in the stipulation, it is difficult to imagine where such investigations would take place other than in Virginia).

The customary method of soliciting new members has been for the Virginia members of the association to recommend to it persons who they believe to be likely prospects. The association then writes to these persons inviting them to make application for membership. All such letters are transmitted by mail from the United States Post Office in Omaha and delivered by mail to the prospects in Virginia. If upon receipt of this letter the applicant is so disposed, he fills out the application blank and sends it by mail to the home office of the association in Omaha, where it is received and acted upon.

The exhibits contained in the record include a letter from the appellant Pratt, as Treasurer of the association, addressed to a prospective member. The letter was accompanied by an application form containing twenty-six questions to be answered by the applicant, who is instructed, after he has signed it, to forward it "with membership fee to R. E. Pratt, Treasurer," Omaha, Nebraska. The application form contemplates reference to an existing member of the association for recommendation of the applicant for membership. There appears on the application the following:

> "Money Back Guarantee
> "Our policies are issued subject to the approval of the applicant. If not satisfactory they may be returned within ten days from date of issuance and all money paid thereon will be refunded promptly."

In addition, there was also enclosed with the letter of solicitation a separate, printed "Absolute Guarantee" slip containing a provision in conformity with the one quoted above. On the face of this slip appears the following:

> "Note—It is not necessary to show the name of anyone as recommending you, as you have already been recommended to us by one of our members."

On the reverse side of said guarantee slip appears a printed copy of a letter from one of the members of the association residing at Baltimore, Maryland. In this letter the member expresses thanks for the promptness with which the association has paid benefits on account of his recent illness and concludes with this statement: "I am working on several of my friends to get them to join and expect to send you several applications real soon."

The Supreme Court of Appeals of Virginia held that the mailing of a copy of the letter received by the association from its Baltimore member stating that he was working on several friends and expected to send in their applications constituted an implied invitation to its members not only to send in the names of persons recommended for membership, but also to solicit and send in completed applications for membership. The Court further held that, while old members have not been technically designated as agents of the association or employed to solicit for it, its encouragement of that activity and the acceptance of the fruits thereof by taking the same without question, and relieving the prospective member of the requirement of furnishing a reference, constituted a ratification of the efforts of the old members and rendered the association responsible therefor. The Court also held that the forwarding of the membership certificate to the Virginia applicant, subject to his approval, rendered it merely an offer on the part of the association and that it was the approval of the provisions of the certificate and the acceptance thereof in Virginia by the prospective member which consummated the contract.

The above statement of facts is based upon the opinion of the Court below found at pages 30 and following of the record, the Stipulation of Facts found at pages 13 and 14 of the record, and the exhibits filed with the record.

D.
The Proceedings Below

Pursuant to section 6 of the Virginia Securities Act, proceedings were instituted against the Appellants by the State Corporation Commission of Virginia on May 5, 1947, in which the appellants were charged with advertising, offering for sale and promoting the sale of the securities

in question in Virginia without having procured the necessary permit or authorization and in contravention of the provisions of the Virginia Securities Act. Notices of the proceedings were sent to the appellants by registered mail, and the post office receipts, filed as exhibits, showed delivery of the same. By the Stipulation of Facts the appellants admitted actual receipt of such notice. The notice informed the appellants that at the time indicated they would be given an opportunity to be heard upon whether a cease and desist order should be entered against them.

The appellants appeared specially by counsel and objected to the jurisdiction of the Commonwealth of Virginia and the State Corporation Commission, basing their objections on the grounds asserted in this appeal. After the hearing the Commission entered the order complained of. The order recited the finding of the Commission that the appellants had been engaged in the business of soliciting membership certificates in Virginia and in advertising, promoting, offering for sale, and in selling securities in Virginia without complying with the Virginia Securities Act. The order enjoined the appellants from continuing such activities unless and until they complied with that statutory enactment. The Supreme Court of Appeals of Virginia affirmed this judgment.

THE QUESTIONS PRESENTED

By this appeal the following questions are presented:

1. May the Commonwealth of Virginia, for the purpose of protecting its citizens and residents, direct that non-residents and foreign corporations not domesticated in Virginia comply with the Virginia Securities Law before promoting and soliciting in Virginia the sale of securities to residents of Virginia

when the solicitation and making of the offers of sale of such securities are carried on in the manner adopted by the appellants? and

2. May the State Corporation Commission, after notice by registered mail, enter an order directing non-residents and foreign corporations doing business in Virginia in the manner and by the means adopted by the appellants to cease and desist from such activities until they comply with the Virginia Securities Law?

The second question stated above is the one directly involved in this proceeding, but the first is embraced therein and since it is the primary and fundamental question it has been stated first.

OUTLINE OF ARGUMENT

In Part I of the argument in the appellants' brief it is contended that the proceedings in the State Corporation Commission of Virginia were in personam and that notice given by registered mail sent beyond the boundaries of the State was not sufficient upon which to base the action taken. We think that, in order to determine whether the action complained of could be taken after such notice, it is first necessary to consider the objects and purposes of the Virginia Securities Law and the real purpose and effect of the order entered in this case. Moreover, if the first question stated above is answered in the affirmative, we think it will readily be seen that the second question should also be answered in the affirmative. Therefore, as suggested by our statement of the questions presented, we will reverse the order of argument of the points involved adopted by the appellants and will attempt to sustain the following propositions in the order set out here:

I. The Commonwealth of Virginia may regulate the promotion of the sale of securities in Virginia by non-resident individuals and corporations as well as by residents, whether the same be carried on by the use of the mails or not.

II. The order or decree complained of is not such an order or decree in personam as must be supported by personal service of process upon persons physically present in Virginia.

III. The activities of the appellants in Virginia were sufficient to support proceedings under section 6 of the Virginia Securities Law had after actual notice sent by registered mail.

ARGUMENT

I.

The Commonwealth Of Virginia May Regulate The Promotion Of The Sale Of Securities In Virginia By Non-resident Individuals And Corporations As Well As By Residents, Whether The Same Be Carried On By The Use Of The Mails Or Not.

On page 32 of the appellants' brief it is contended that section 6 of the Virginia Securities Law as applied to them violates the Fourteenth Amendment of the Federal Constitution in attempting to regulate and control their activities occurring beyond the borders of Virginia.

The action of the Commonwealth of Virginia as embodied in section 6 of the Virginia Securities Law and the order of the State Corporation Commission complained of are directed at *activities which take place in Virginia*. It affects action taken without the State only in so far as such action results in forbidden activity in Virginia. In *Osborn* v.

Osbin, 310 U. S. 53, it was forcefully brought out that insurance contracts with Virginia citizens on Virginia risks (and we are here concerned with securities in the form of insurance contracts) are very definitely a matter of local concern to Virginia. Mr. Justice Frankfurter pointed out that the mere fact that State action may have repercussions beyond State lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. In that case the Court concluded that, in passing the Virginia registered resident agent law, Virginia had exerted its powers as to matters within the bounds of its control. See also *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313.

The promotion of securities within Virginia, their advertisement in that State and offers for their sale made there are very much the concern of the Commonwealth of Virginia and the regulation of those engaged in such activities is a matter clearly within the police power of Virginia. The opportunity for fraud in the sale of securities is manifest and it is well established that a State may, in the exercise of its police power, take legitimate measures to prevent the practice of fraud or imposition upon its citizens through the offer, advertisement, promotion and sale of securities. It may require those dealing in securities to meet statutory requirements designed to prohibit fraudulent securities and to authorize only those which involve no fraud, actual or potential, and then only after a full disclosure of all of the facts. See the three leading cases of *Hall v. Geiger Jones Co.*, 242 U. S. 539; *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, and *Merrick v. N. W. Halsey & Company*, 242 U. S. 568, in which the "Blue Sky" laws of Ohio, South Dakota and Michigan were upheld. In *Hall v. Geiger Jones Co., supra*, the Court said:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties, or other, repressive measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "blue sky" '; or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review. * * * " (242 U. S. 539, 550)

As stated in Section 19 of the Virginia Securities Law, the purpose of the statute is not to prevent the sale of any particular kinds of securities, but is to give the State Corporation Commission the power to regulate the sale of securities and to require promoters of securities to *make proper disclosure of material facts* to and for the benefit of the public and to require the promoters of securities to apply the proceeds of the sale thereof to the purposes for which they are sold. The Act provides that no securities designated by the Act shall be *offered for sale, advertised for sale*, sold, disposed of, distributed or *promoted* except after qualifications and the submission of certain data and information required by the Act. As pointed out in *Virginia Brewing Co. v. Webber*, 167 Va. 67, and *Watters &*

Martin v. *Hoines Corp.*, 136 Va. 114, the object and purpose of the Blue Sky Law is to suppress the evil of an investment market flooded with investments of little or no value and promoters who induce the public to purchase that type of securities by regulating the business of those promoting the sale of securities.

The regulation of such activities when conducted by non-residents is even more important than when they are conducted by residents because of the difficulties which citizens of Virginia would have in securing redress from such non-residents in cases of fraud. At page 4 of the appellants' brief it is stated that there is no charge or intimation that the membership certificates offered by the appellants were fraudulent, misleading or inferior. That is not the question. The appellants have never submitted their securities to the regulatory agency of the Commonwealth of Virginia nor submitted the required information upon which such questions could be checked before a permit to offer them in Virginia is issued. While their securities may be entirely satisfactory, their contention that they are not subject to supervision by Virginia because of the manner in which they do business would be just as valid if applied to the most unsatisfactory and worthless securities. If the appellants be sound in their contention that those who promote the sale of securities in Virginia by the means adopted by the appellants cannot be called by the State to answer proceedings to require them to comply with the preliminary requirements of the Virginia Securities Law designed to protect the public from the promotion of worthless securities, how much more helpless would be the Virginia residents who succumb to their inducements and invest funds in such securities.

At page 9 of the appellants' brief it is stated that the order complained of prohibits the appellants from acquiring

additional members for the association in Virginia, even though the appellants in so doing are not present in and perform no acts within Virginia. This is not correct. Section 6 of the Virginia Securities Law expressly provides that it shall not be construed so as to impair or infringe upon the right of any person, *of his, her or its own initiative*, to subscribe for, order, or buy any security from any non-resident person, firm, corporation or association. See appendix to appellants' brief at page 41. The decretal paragraph of the order complained of applies only to activities which occur *in Virginia*. It orders the appellants to cease and desist "from offering, advertising, promoting, selling, assisting or participating in or acting in furtherance of the offer, advertisement, sale and/or promotion *in Virginia*" of securities until a permit has been secured.

The appellants cite a number of cases in support of the proposition that a state cannot prohibit a non-resident from making a contract beyond its borders with one of its citizens. This Virginia has not attempted to do by the statute here involved. It is only when the non-resident, of his own initiative, comes into Virginia or projects his activities across the borders of this State for the purpose of promoting, advertising and making offers for sale of securities in Virginia that his activities come within the terms of the statute. While the State may not be able to prevent the making of contracts outside of its limits, yet when the non-resident carries on promotional activities within the State, his conduct is properly subject to regulation by Virginia.

The solicitation, the promotion, the advertising, and the making of the offers for sale take place in Virginia. The fact that neither the appellants nor their agents are present in Virginia is not material. The public of Virginia is nevertheless being subjected to their inducements to purchase their securities. In *Illgeyer* v. *Louisiana*, 165 U. S. 578, the

Court said that the mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. It is also true that the mere fact that a person is not within the limits of a particular State does not prevent his making an offer for sale or carrying on promotional activities within its limits while he himself remains out of it.

The fact that the activities of the appellants which took place in Virginia may have originated without the State is immaterial. The use of the mails to send promotional material and offers of sale of securities into Virginia has resulted in the commission of an offense within this State.

The general rule is thus stated in 14 Am. Jur., Crim. Law, section 227:

> "A question often arises as to the jurisdiction of a crime where the accused, while in one state, sets in motion a force which operates in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person in another state with intent to injure him. In such cases the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act. * * *"

In *Palliser* v. *United States*, 136 U. S. 257, 266, the following was said:

> "When an offense is committed by means of a communication through the postoffice, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter." (Citing authorities) "But it does not follow that he is not punishable at the place where the

letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place; * * *" (Citing authorities)

United States v. *Steinberg, et al.*, 62 F. (2d) 77, involved the jurisdiction of a United States District Court of New York to indict and punish a defendant who was accused of using the United States mails to defraud. The letter in question was mailed in Canada, and the defendant claimed that he had not committed any criminal act within the State of New York and that court was without jurisdiction to try the offense. In affirming a judgment of conviction by the District Court, the Circuit Court of Appeals of the Second District used this language:

"* * * It has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which that evil is the fruit. *Strassheim* v. *Daily*, 221 U. S. 280, 284, 31 S. Ct. 558, 55 L. Ed. 735; *Lamar* v. *U. S.*, 240 U. S. 60, 64, 65, 66, 36 S. Ct. 255, 60 L. Ed. 526; *Ford* v. *U. S.*, 273 U. S. 593, 620, 621, 47 S. Ct. 531, 71 L. Ed. 793. The constitutional question is frivolous." (62 F. (2d) 78).

The Supreme Court denied a writ of certiorari to review this case. *Steinberg* v. *U. S.*, 289 U. S. 729.

That the contention of the appellants is unsound and that Virginia may regulate the promotion of securities in this State by non-residents who conduct such activity only by the use of the mails is clearly shown by *Merrick* v. *N. W. Halsey & Co.*, *supra*. In that case one of the complainants attacking the Michigan Blue Sky Law had no offices in Michigan, had no salesmen there, and merely solicited

orders for the purchase of securities by means of the mails. They wished to continue making further offers in the State and contended that the statute constituted an unlawful regulation of interstate commerce. This contention the Court rejected on the authority of its decision in *Hall* v. *Geiger-Jones Co., supra.*

In *State of West Virginia* v. *Adams Express Co.*, 219 Fed. 794 (C. C. A. 4th Cir., 1915), the State of West Virginia sought an injunction against the Adams Express Company, R. H. Clendenin and Edward Beigel, alleging: That Beigel, a resident of Ohio, sent through the mails to persons in West Virginia circular letters soliciting the purchase of intoxicating liquors, contrary to the law of the State; that Clendenin, induced by the solicitation, ordered beer from Beigel, which was carried from Cincinnati to Charleston, West Virginia. Contending that the Express Company was aiding Beigel in his unlawful attempt to make sales in West Virginia, the State sought an injunction to prevent delivery of the beer unless the consignee could show that he ordered the same without having received from Beigel letters advertising the beer or soliciting orders for its purchase.

Against the contention that the State law could not prevent solicitation through the United States mails the Court held:

> "It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit con-

tributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. *In re Pallister*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; *United States* v. *Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; *Hayner* v. *State*, 83 Ohio St. 178, 93 N. E. 900; *State* v. *Morrow*, 40 S. C. 221, 18 S. E. 853." (219 Fed. 794, 799).

Just as Federal protection to the liquor traffic had been withdrawn by the Wilson Act and the Webb Kenyon Act, so here has Federal protection been withdrawn from the promotion of the sale of securities by means of the United States mails. Congress in enacting legislation regulating the sale of securities by means of the use of the mails expressly provided as follows:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia over any security or any person." Title I. Section 18 of the Securities Act of 1933 (Title 15, Section 77-r of United States Code Annotated).

It was clearly the intention of Congress to leave the States free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and, in the absence of such conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction. If a non-resident wishes, by means of the mails or otherwise, to advertise, promote or offer his securities for sale in Virginia, he must comply with the appropriate regulations of that State and, if he carries on such activities in Virginia without so doing, he

commits an offense in Virginia. *In re Pallister, supra* and *United States v. Steinberg, supra.*

We have pointed out above that the conduct of such activities is properly a matter for the State to regulate. The question is not, as in *Allgeyer v. Louisiana, supra*, whether a state may prohibit its citizens from making elsewhere a contract of insurance with a non-resident company, but whether the non-resident company has the unrestricted right to solicit insurance within the state. As stated in *Osborn v. Ozlin, supra*, considerable doubt has been cast upon the opinion in the *Allgeyer Case*, but accepting it as in full force, it is well established that a foreign corporation has no constitutional right to solicit insurance within a state by means of an agent in violation of the laws of the state. *Bothwell v. Buckbee*, 275 U. S. 274; *Nutting v. Massachusetts*, 183 U. S. 553. There is a broad distinction between the want of power of a state to prevent a resident from making a contract elsewhere and the power of the state to regulate the carrying on within its borders of the business of soliciting orders for such contracts. *Delamater v. South Dakota*, 205 U. S. 93.

If a State can regulate such solicitation and promotional activities when carried on through an agent present in the State and the use of the mails does not exempt the promoter's activities from regulation, there is no reason why such promotional activities are not subject to regulation simply because the promoter has chosen a postman as his agent to deliver his promotional material rather than some other individual.

This is not such a case as was presented in *New York Life Insurance Company v. Head*, 234 U. S. 149, or in *Hartford Accident and Indemnity Company v. Delta and*

Pine Land Company, 292 U. S. 143, where one State attempted to extend the effect of its laws beyond its borders so as to destroy or impair the rights of citizens of *other States* to make a contract *not operative within its jurisdiction* and lawful where made. Nor is it such a case as was presented in *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346, and in *Compania General de Tabacos* v. *Collector of Internal Revenue*, 275 U. S. 87, in which a State is attempting to exact a tax or a penalty upon actions taken wholly without the State. In *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426, the State of Mexico sought to prohibit the payment of any premium to non-residents for obtaining insurance contracts on risks in New Mexico. This, the Court held, went beyond any legitimate interest of the State.

The question presented by this case is more nearly parallel to that presented in *Hoopeston Canning Co.* v. *Cullen*, *supra*, where regulations governing dealings of foreign insurance companies with citizens of New York with respect to New York risks, which regulations were designed to protect the citizens of New York, were under consideration. In that case the Court said:

> "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss. * * *

"The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

* * * * *

"These regulations cannot be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business. The appellants cannot, by spreading their business and activities over other states . . . set at naught the public policy of New York. * * *" (318 U. S. 313, 316, 317, 320)

The activities which the Commonwealth of Virginia regulates by its Blue Sky Law are activities conducted in Virginia and the order here complained of is directed only at such activities in that State. The fact that the activities in Virginia had their origin in actions taken without the State is immaterial. The regulations of such activities resulting in Virginia are designed to protect Virginia citizens and are fully within the power of that State to adopt.

II.

The Order Or Decree Complained Of Is Not Such An Order Or Decree In Personam As Must Be Supported By Personal Service Of Process Upon Persons Physically Present In Virginia.

While the soliciting of orders for the sale of securities and similar promotional activities conducted in Virginia by non-residents is a proper matter for regulation by the State, the Legislature realized that the actual enforcement of such regulation against non-residents who remained physically beyond the boundaries of the State would present practical difficulties. It provided, therefore, by section 6 of the Virginia Securities Law (section 3848(52) of Michie's Code, 1942) that, upon complaint that such a non-resident is promoting in this State securities which have not been qualified, the State Corporation Commission may, after ten days notice sent by registered mail, issue a cease and desist order enjoining such activities and give such publicity to the order as it may see fit "including notice in either case to the public through the press or otherwise as the Commission may, in its discretion, determine to be advisable for the reasonable information and protection of the public."

The General Assembly has thus adopted this as a practical method of protecting the public from the inducements of promoters operating from without the limits of the State. It has provided that the public shall be informed that the non-resident is promoting securities which have not been qualified under the law of Virginia and without complying with those statutory provisions designed to furnish a measure of protection to the public. Residents of Virginia will then be advised that, if they wish to invest in the security offered, they do so wholly at their own risk.

The appellants contend that the proceedings and the cease and desist order entered therein are such proceedings and order in personam as must be supported by personal service upon persons physically present in Virginia. It is contended that the final order of the State Corporation Commission of January 5, 1948, issued pursuant to section 6 of the Virginia Securities Law, is an in personam decree in the form of a permanent injunction prohibiting the appellants from carrying on certain activities on pain of fine or imprisonment. There is nothing in section 6 of the Virginia Securities Law which authorizes the State Corporation Commission to impose a fine or to imprison the appellants. In prescribing the procedure to be followed under section 6, the General Assembly of Virginia has authorized the State Corporation Commission in proceedings had thereunder to issue a cease and desist order in the nature of a permanent injunction enjoining further illegal activities in Virginia. By the order issued in this case no fine was imposed. The appellants were simply ordered to cease their activities in Virginia until they had complied with the Virginia law.

The order itself does no more than the statute has already done. It simply tells the appellants to cease promoting securities in Virginia until they have secured the necessary permit so to do. It is simply a directive to the appellants, given after actual notice, to comply with the statute. Actually such an order or decree could be issued by an administrative officer without any hearing and after no notice whatsoever. Since the order requires nothing not already required by law, notice and an opportunity for hearing are not required to meet the constitutional requirements of due process of law. It is no ground for complaint that the appellants have in fact been given actual notice and a full opportunity to be heard.

This case is similar to the case of *Stevens* v. *Television, Inc.*, 111 N. J. Eq. 300, 162 Atl. 248, where the Attorney General of New Jersey, acting under the Blue Sky Law of that State, sought an injunction to restrain the defendants from the further sale of securities in New Jersey. The defendants were served by registered mail forwarded to addresses beyond the boundaries of the State. The New Jersey Court said in answer to an argument similar to that presented by the appellants here:

> "The argument is that the suit is in personam and that there can be no personal judgment without personal service within the state. As a general proposition the legal principle is correctly stated. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. But the Fourteenth Amendment, which declares that no state shall deprive any person of life, liberty, or property without due process of law, is not invaded; it is not depriving one of his liberty or property to deny him license to defraud. This is not a case seeking a personal recovery against the defendants; it is to foreclose them. The state is not asking anything of them; it wants nothing from them. The police having driven them across the Hudson, the state seeks assurance, by the injunction, that they will not return unless to show to the court that they are not guilty of the offenses with which they are charged. If they do not avail themselves of the opportunity to contest the merits, they cannot, on special appearance, be heard to assail the power of the state to enforce its police regulations against marauders, nor question the court's jurisdiction to banish them for failure of service of process within the state, which they have made impossible or for want of a hearing before condemning, to which they refuse to respond. The statutory process puts them on notice. They have their choice of appearing and proving their innocence or the consequences, by staying away. They

may submit to our jurisdiction or decline; in either event they will be estopped from denying it.

"That the state has power to ordain against imposition in the sales of fraudulently represented securities is established by law. Hall v. Geiger Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917 F, 514, Ann. Cas. 1917 C, 643; Merrick v. N. W. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498. That it may prescribe the means of protection and the methods of enforcing them necessarily flows from the power to decree and the physical power to enforce its decree. Substituted service—with actual notice—is a valid exercise of the police powers and consistent with due process of law provision of the Federal Constitution. Rubin v. Goldberg, 154 A. 535, 9 N. J. Misc. 400." (102 A. 248, 248)

In the more recent case of *Wilentz* v. *Edwards*, 134 N. J. Eq. 522, 36 Atl. (2d) 423, proceedings under the New Jersey Securities Law, similar to those involved here, were had after notice by registered mail. There the Court said:

"In such case the Chancery decree last made is nominated a 'final decree'. That is a misnomer. The defendants are forbidden to deal in securities within the state until they shall submit to the inquiry sought to be made on behalf of the State. Such a prohibition is in the nature of a preliminary restraint regardless of the name applied to the paper. The title was doubtless given by way of distinguishment from the order to show cause which also contained a restraint.

"* * * Do our constitutional provisions require that a dealer in securities must be brought into court by such a process as would support a judgment against him *in personam* before he may be put to the election of either submitting the bona fides of his conduct as a dealer and the worthfulness of his securities to a duly authorized state officer, or of refraining from

dealing in securities within the state? And if he is keeping himself outside the jurisdiction, with the result that such process may not be served, is a sovereign state powerless to protect its public against his coming surreptitiously within its borders and accomplishing his purpose? We think not. So far as the present issues go there was no need for technical process; that which is called process may be regarded merely as statutory notice that the defendants could not do business here unless they complied with the regulatory requirements. The question of what character of notice of the restraint would lay the individual open to punishment under contempt proceedings or otherwise for disobedience is not before us.

"The cases lose much of their difficulty if it be considered that the Attorney General's position is analagous to that of a licensing officer and that the decrees go no further than to enjoin a dealer from engaging in the security business within the state until he shall have gone through the procedure of appearing and submitting the facts incidental to an application. * * *" (30 Atl. 2d 423, 426)

The Court pointed out that the terms *in personam* and *in rem* came into our jurisprudence from the civil or Roman law and that, while an effort has been made to maintain a sharp distinction, "nice accuracy has more than once yielded to the exigencies of a developing jurisprudence, and, that which is not strictly a thing has nevertheless been given the significance thereof in order to keep the power of the law abreast of changing conditions."

The above cases from the New Jersey Court are cited because of the parallel of the proceedings there involved and the one followed under the Virginia statute and because of the excellent discussion of the nature of the proceedings. As in the cases before the New Jersey Court, the order here complained of does not take anything away from the appel-

lants, nor does it require any action by them. So long as the appellants do not attempt to promote the sale of securities in Virginia in violation of the Securities Law of that State, they are free to go their way. The order entered by the Virginia State Corporation Commission simply tells them that they cannot engage in their promotional activities in Virginia until they comply with the terms of that statute. As pointed out by the Supreme Court of Appeals of Virginia, this was not a proceeding seeking a rendition of a *pecuniary civil judgment* against the appellants. In speaking of the nature of the proceedings the Court below said:

> "The proceeding here before us, however, is essentially different in its nature. It was instituted, not by a contract holder, but by the Commonwealth. The appellants were being investigated by the Commission to determine whether their activities did in fact violate the Securities Act and constitute the commission in Virginia of a misdemeanor. The inquiry is quasi-criminal in its approach." (R. p. 30)

and again:

> "* * * This proceeding is somewhat analogous to the customary preliminary hearing, conducted in cases where an accused is suspected of having committed a felony, to determine whether the charge against him is supported by sufficient evidence to justify laying it before a grand jury. The chief difference is that, in the proceedings here under review, the question to be determined was whether the evidence justified a finding that the Virginia Securities Law was being violated and supported the consequent order to discontinue such violations. The Commission found that the evidence was sufficient to show that such law was being violated, and we concur in that view and in the propriety of the entry of the order requiring such discontinuance." (R. p. 40)

Here, the proceedings also differ from the customary preliminary hearing in criminal matters, in that no penalty is imposed nor are the appellants held pending further proceedings because of their past violations. They are simply told not to continue their activities in Virginia until they have first complied with the Virginia law. Appellants argue that, since sections 15 and 17 of the Virginia Securities Law,* provide for fines and imprisonment (section 17 provides only a fine) for the violation of the Securities Law or orders of the Commission issued thereunder, an order issued under section 6 is an *in personam* judgment.

Sections 15 and 17 of the Virginia Securities Law are not involved in proceedings under section 6, which provides for an independent proceeding to accomplish the purposes there set out. Section 15 of the act provides that any person violating the act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a

* Section 15. Any issuer, promoter, dealer, broker, agent, advertiser, or other person, as principal or otherwise, who shall commit, in whole or in part, in this State any act declared unlawful by this act or who shall fraudulently evade or attempt to evade the provisions thereof, shall be deemed guilty of a misdemeanor where not otherwise provided, and on conviction, be punished by a fine of not less than twenty-five nor more than five thousand dollars, or by confinement in jail for not less than thirty days or more than one year, or by both such fine and imprisonment. Indictments or presentments charging violation of this act shall not be certified to a justice of the peace for trial, but the jurisdiction for trial shall be in the courts of record having jurisdiction of felonies. The court before whom such fine is imposed shall order one-half of such fine to be paid to the person or persons instigating the prosecution in which such fine was imposed.

Every sale or contract made in violation of any of the provisions of this act shall be voidable at the election of the purchaser, and the person making such sale or contract for sale, and every agent of or for such seller who shall have participated or aided in any way in making such sale, shall be jointly and severally liable to such purchaser, upon tender to the seller or in court of the securities sold or

fine or confinement in jail or both. Proceedings to enforce the penalties of such violations must be instituted by indictment or information in the appropriate courts of record of the State. Section 15 has no relation whatsoever to section 6.

Section 17 authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the law. As pointed out by the State Corporation Commission in its opinion, Record, page 23, this section is not involved in proceedings under section 6, which section does not provide for the imposition of penalties upon those proceeded against thereunder. The State Corporation Commission held, just as did the New Jersey Court in *Wilentz* v. *Edwards, supra*, that the question of what character of process would lay the individual open to punishment under contempt proceedings or otherwise for disobedience was not before the Court and that it would be time enough to determine that question

---

of the contract made, for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorney fee in any action brought under this section, or any action or suit in which the question of the validity of the sale or contract is cognizable, and the right to such avoidance shall be barred by the lapse of two years from the date of sale of the security or land, except where there has been an actual concealment of the facts constituting a violation of this act.

The limitation of any prosecution for a violation of any act declared by this chapter to be a misdemeanor shall hereafter be two years from date of violation.

Section 17. In the event of the failure of any promoter, or of any other responsible person or corporation subject to any of the provisions of this act, to comply with any order which the commission is authorized by this act to make, then it shall be unlawful for such security or such land to be sold until such order is complied with or set aside, as herein provided, and the commission shall have power to impose a fine not exceeding five hundred dollars, for failure or refusal of any person or corporation to comply with any order which the commission may have made, under authority of this act, such fine to be collected by its process, as provided by law.

if and when actions are laid under sections 15 or 17 of the Virginia Securities Law.

If it be true that proceedings can be had in the future under section 17 for a violation of an order issued under section 6, it is not section 6 or the proceedings had thereunder or the order issued therein which will cause the imposition of any penalty. Rather it will be the actions of the appellants themselves in wilfully violating the statute that will subject them to such penalties. The statute, itself, makes it unlawful to promote the sale of securities in Virginia without complying with certain conditions. The order issued under section 6 puts the appellants on actual notice and directs them not to violate the law in the future. If the appellants wilfully violate the statute after receiving such notice and thereby subject themselves to an added penalty, they have only themselves to blame. There is no lack of due process in a statute which provides for such a preliminary warning.

III.

The Activities Of The Appellants In Virginia Were Sufficient To Support Proceedings Under Section 6 Of The Virginia Securities Law Had After Actual Notice Sent By Registered Mail.

We are not concerned here with the question of whether the appellants are *doing business* in Virginia to such an extent that would justify substituted service of process as the basis of an action brought by a private individual to secure a *pecuniary civil judgment* against them. We are here concerned with whether *the particular proceeding* now before the Court could be had and whether the *particular order entered in this case* could be entered after actual notice sent by registered mail.

The appellants assert that they may illegally promote the sale of securities in Virginia by use of the mails and at the same time contend that the Commonwealth of Virginia may not order them to cease violating the statutes of Virginia after giving them actual notice of the proceedings by the very means they themselves are using. The appellants obviously wish to conduct certain activities in Virginia; else they would not be complaining of an order which simply directs them not to do certain things *in Virginia*. Yet they claim that it is a denial of due process to require them to answer in Virginia proceedings brought to determine whether such activities constitute a violation of the laws of Virginia and, if it be so found, to compel them to cease such activities. The appellants simply wish to have their cake and eat it too.

Of the seventeen cases cited by the appellants to show that personal service of process upon someone physically present in Virginia should have been had, fifteen, including the much relied upon *Minnesota Commercial Men's Asso.* v. *Benn*, 261 U. S. 140, were cases in which a *pecuniary civil judgment* was sought against the defendant. One, *Providence Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103, did not involve service of process and the other, *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723, was an action by one corporation against another alleging a patent infringement and asking appropriate relief. Service was had upon a soliciting agent who received and forwarded to his principal one order for goods which was accepted in another State. The circumstances of only one sale appeared in the record and *that was negotiated by the purchaser in order that it might afford the basis for a suit.* The Court held that, since the sale was consummated in St. Louis, the patent infringement did not occur in New York and that

the United States District Court did not have jurisdiction under the Act of March 3, 1897, which required the suit to be brought where the infringement took place.

As we have pointed out under Part II of our argument, this is not a case in which a pecuniary civil judgment is sought against the appellants. It is an action of an entirely different nature, brought because of the very activities which the appellants are carrying on in Virginia, and concerns those activities only. Even if the proceedings in question be considered as *in personam* proceedings, it is but proper that the appellants be called upon to answer them in Virginia. Actual notice of the proceedings sent by registered mail fully meets all requirements of due process of law.

Beginning with *Hess* v. *Pawloski*, 274 U. S. 352, it has been recognized that in certain cases (even in some instances where a money judgment is sought) it is proper to require a non-resident to answer for his conduct in a State giving rise to causes of action against him, provided the provisions for notice are adequate to apprise him of the proceedings and he is given adequate opportunity to present his defense. In *Wuchter* v. *Pizzuti*, 276 U. S. 13, the Court stated that a number of cases there reviewed—

> "* * * indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendants will receive actual notice, and that is the principle that we think should apply here." (276 U. S. 13, 24)

In the case of corporations which have no physical "presence" a multitude of cases have been decided on the questions of when they can be called upon to answer an

action in a particular case and of what type of process will suffice to bring them before the Court. A number of fictions have been resorted to, enlarged upon and modified. Throughout all of the cases the concept of fairness and reasonableness appears to be the controlling factor. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, the Court upheld *criminal process* upon an agent who had not been designated by the company as one to receive summonses on behalf of the company. The Court discussed the activities of the agents of the company and concluded that the company was present "doing business" in Kentucky. It stated:

> "We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state." (234 U. S. at page 589)

An excellent discussion of the growth of the law in this connection is contained in the opinion of the late Mr. Justice Rutledge in the case of *Frene* v. *Louisville Cement Co.*, 134 Fed. 2d 511 (U. S. Court of Appeals for the District of Columbia, 1943) decided before he was elevated to the bench of this Court. In that case Mr. Justice Rutledge was leaning toward the decision of this Court in the case of *International Shoe Co.* v. *Washington*, 326 U. S. 310, in which was sustained the jurisdiction of the Washington State Courts to entertain an action for the recovery of unemployment compensation taxes arising out of salaries paid the agents of the company for their services in soliciting orders in the State, although the solicitors had no authority to bind the

company or to accept service of process, their authority being strictly limited to taking orders and submitting them to the home office of the company in St. Louis, Missouri. In that case Mr. Chief Justice Stone said:

"Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U. S. 714, 733. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' * * *

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, Klein v. Board of Supervisors, 282 U. S. 19, 24, 75 L. Ed. 140, 143, 51 S. Ct. 15, 13 ALR 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in Hutchinson v. Chase & Gilbert (CCA2d) 45 F. 2d 139, 141. *Those demands may be met by such contacts of the corporation with the state of the forum* as make it reasonable,

in the context of our federal system of government, to require the corporation to defend *the particular suit which is brought there.* An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson v. Chase & Gilbert, supra (P. 141).

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * *

* * *

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

* * *

"Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the

State of Washington involves an unreasonable or undue procedure.

"We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. *It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonably assurance that the notice will be actual.* * * * *Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.* * * * " (326 U. S. 310, 316-320) (Italics supplied)

In that case the defendant corporation maintained no office or place of business in Washington, had no property there, and made no contracts there or deliveries of goods there in intrastate commerce. It did have salesmen there soliciting orders, but no salesman had authority to bind the company by entering into contracts or to make collections. The salesmen were not the corporation since a corporation has no personality. It was their activities in the state that gave the court its jurisdiction. In that case the corporation conducted no activities within the state through its salesmen which the Travelers Health Association does not conduct in Virginia, though without the means of salesmen present in Virginia. The Commonwealth of Virginia has the same "contacts, ties or relations" with the Travelers Health Association as Washington had with the International Shoe Company, even though no salesmen of the association are in Virginia. That association is conducting exactly the same "activities" in Virginia as the shoe company conducted in Washington. Systematic solicitation can be conducted

by agents dressed in the uniform of the United States Post Office as well as by private individuals dressed in an ordinary business suit. Can it be said to be unreasonable that the Travelers Health Association, which desires to conduct activities in Virginia, should, after actual notice, be required to defend this particular suit brought to direct them to comply with the laws of Virginia before continuing such activities?

In *Storey* v. *United Insurance Co.*, 64 F. Supp. 896 (D. C. East. Dist. of S. C.) decided in 1946 after the decision in the *International Shoe Company Case, supra*, substituted service of process under a South Carolina statute was held sufficient to give jurisdiction to render an in personam judgment in a civil action for money brought by the beneficiary of an insurance policy against a non-resident insurance company that maintained no place of business in South Carolina, had no property there and had never maintained agents, solicitors or representatives there and never transacted business there except through the use of the mail facilities of the United States Government. The company solicited insurance contracts by advertisements in publications having a national circulation and as a result of such advertisements the plaintiff wrote the company inquiring about its insurance contracts and the company, in response to such inquiry, forwarded by mail an application form with an invitation that it be filled out and returned. The contract was later mailed to the plaintiff. While the court construed the contract as having been made in South Carolina because of the insured's right to reject the same when delivered and construed it as payable in South Carolina upon the event of loss and as giving the company the right to make an autopsy in South Carolina upon the death of the insured, it would seem that the activity of the United Insurance Company in South Carolina was far less than

that of the Travelers Health Association in Virginia, where the latter company has by sending its mail solicitations into the State secured some 800 members.

It is the position of the appellee that activities of the Travelers Health Association conducted by mail, that is the advertising, promotion and offers of sale of its securities that are so carried on in Virginia, were sufficient "activities" in and "contacts" with the Commonwealth of Virginia to sustain the proceedings here in question and the order here complained of, and were sufficient to authorize the statutory process provided for such proceeding and order. The Supreme Court of Appeals, however, actually found that the activities of the Travelers Health Association went beyond the mere mailing of its promotional material and its offers of sale of its securities into Virginia. The Court below found that the Travelers Health Association encouraged and received the benefit of the activities of its members in soliciting new members in Virginia; that, since the contracts were subject to approval by new members, the contracts were consummated in Virginia; that the association had caused claims to be investigated in Virginia; and had discharged obligations in Virginia. The finding of the Court below as to these additional activities is clearly supported by the evidence, which includes the exhibits filed with the record. The evidence clearly supports the conclusion that there were sufficient activities to call upon the association to answer the proceedings instituted after actual notice sent by registered mail.

CONCLUSION

In their conclusion the appellants state that they wish to emphasize that they do not question the power of Virginia to regulate and control insurance companies to the extent

that they or their agents do business within its borders and that they do not question the validity of the Securities Law to the extent that it provides that individual and corporate residents of other States shall not come into the State for the purpose of doing business there without first submitting to the regulatory authority of the State.

It is the contention of the appellee that the appellants have "come into Virginia" and this without complying with the regulatory provisions of the Virginia statute. The appellants have exerted their efforts in Virginia with quite some measure of success. By projecting its activities across the borders of that State, the Travelers Health Association has secured some 800 members and, if left to its own devices, it will undoubtedly secure many more without ever complying with the Virginia statute. We believe it has been said that "By their works, ye shall know them", and by their "works" the appellants have come into Virginia and should be made to comply with its regulations. The appellants, however, desire the power to come into Virginia without so doing.

It is respectfully submitted that the decisions of the Supreme Court of Appeals of Virginia in upholding the order of the State Corporation Commission entered on January 5, 1948, and sustaining the constitutionality of section 6 of the Virginia Securities Law should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1949

No. 76 **76**

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF STATE OF NEW YORK

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BATAVIA TIMES, LAW PRINTERS,
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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF STATE OF NEW YORK

Now comes the State of New York, by its Attorney General, and respectfully begs leave of the Court to submit the subjoined brief as *amicus curiae* upon the above-entitled appeal in which probable jurisdiction has been noted and the case transferred to the summary docket.

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Statement

The case involves the efficacy, on jurisdictional grounds, of a cease and desist order issued by the Virginia State

Corporation Commission against an unauthorized foreign insurer and its treasurer after notice sent by registered mail to them in Nebraska under Section 6 of the Virginia Securities Law. That statute authorizes such service when personal service within the State cannot be had because the offering of securities (which the appellants' membership certificates and contracts of indemnity or insurance are conceded to be within the statute) is by "advertisement and or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State." The appellant insurer had not qualified its "securities" in accordance with Virginia law nor was it authorized to transact the business of insurance therein.

The appellant Association was incorporated under the laws of Nebraska and primarily confines its activities in soliciting, effectuating and carrying out its contracts of indemnity or insurance with residents of other States by transactions through the mail. The agreed facts are that the Association never had any office or agent in Virginia although it was also agreed that new members are usually obtained through recommendations of existing members, presumably including those in Virginia, and that claims have been investigated during the period that the Association has solicited and obtained numerous memberships throughout Virginia, payment being made by mail from the home office.

The appellants contend among other things that the service of process as authorized and made is invalid under due process requirements to enable Virginia to subject them to any *in personam* order or requirement. It is this phase of the case which is of particular importance to the State of New York because of provisions in its own statutes sub-

jecting unauthorized foreign and alien insurers to the jurisdiction of the New York courts in suits by or on behalf of resident insureds or beneficiaries under contract with such insurers.

The Interest of the State of New York

By Chapter 826 of the Laws of 1949 there was added to the New York Insurance Law (McKinney's Consolidated Laws of New York, Book 27) a new Section 59-a. This seeks to utilize the public authority of the State for the protection of its own residents with whom unauthorized foreign insurers have entered into binding contractual relations by business means under which the insurer is able to avoid physical entry into the State by its directly employed agents.

Subdivision 1 of the Act asserts the concern of the State that its residents insured by unauthorized insurers are faced with "the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." In furtherance of that interest the Legislature provided a method of substituted service on such insurers by exercising its power to define what "constitutes doing business" within the legitimate local concern of the State so as to bring the contracting party under the jurisdiction of the State courts for the enforcement of its obligations.

The long-settled power of the State to regulate the business of insurance as seriously affecting the public welfare (*German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389) clearly justifies its concern with the obvious problem of the unauthorized insurer which seeks to remain beyond its reach while at the same time inducing those who may look to it for protection to enter into insurance contracts.

The legislative finding, presumptively correct, of an existing situation calling for any valid and appropriate exercise of the public power needs no unwarranted assumptions. The evil is clear and present. Contractual obligations, even if otherwise unobjectionable, without practical means of enforcing them present an obvious field for overreaching the public by the unscrupulous or even by those who do not exercise a high degree of the restraint imposed only by the desire to meet the bargain fairly. The evils affecting the State's interest arising out of the activities of unlicensed insurers were stated by the Joint Legislative Committee on Insurance Rates and Regulation in its 1949 Report to the Legislature recommending enactment of Laws of 1949, Chapter 826 (Leg. Doc. [1949] No. 70, pp. 41 *et seq.*)

The method adopted was a definition of the acts deemed sufficient to bring an unauthorized foreign insurer into such direct contact within the State with its residents in the course of its business that it could be subjected to the personal jurisdiction of its courts. Any act of such an insurer in New York, "effected by mail or otherwise", consisting of the issuance or delivery of insurance contract to New York residents or authorized corporations, the solicitation of such contracts, the collection of the consideration therefor or "any other transaction of business" is made equivalent to and constitutes the appointment of the Superintendent of Insurance as agent for the service of process in any suit or proceeding by or on behalf of an insured or beneficiary arising out of any such contract of insurance. The Superintendent is then required to forward a copy of any process so served to the defendant at its last known principal place of business by registered mail. Such service is only sufficient provided the plaintiff also and within ten days sends notice of service on the Superin-

tendent and a copy of the process to the defendant by registered mail, return receipt requested (Insurance Law, § 59-a, subd. 2, pars. (a) and (b)).

The inspiration for such a statute is the same as that which prompted Virginia, under her Securities Law, to assert jurisdiction to restrain transactions of unauthorized foreign insurers looking to insurance obligations by and to her citizens and effective within her borders. Its validity is similarly affected by consideration of whether the State has taken hold of a subject in sufficiently direct contact with its proper local concerns within its borders.

ARGUMENT

The States are not powerless under the Fourteenth Amendment of the United States Constitution to obtain personal jurisdiction in cases arising out of business transactions originating beyond their borders which come into direct and substantial control with the interests of their residents within them.

There can be derived from the cases no rigid formula for determining when business reaching across State lines is being carried on or done in a State within the meaning of that State's statutes and reach of its jurisdiction. This Court has refused to plot precise lines leading to mathematical results (see *St. Louis, Southwestern Ry. Co. v. Alexander*, 227 U. S. 218 (1913); *International Harvester Co. v. Kentucky*, 234 U. S. 579, 583 (1914)). The appellants in the instant case, however, put forth a dogmatic means of determination claimed to be decisive. In order to support service of process other than personally so as to give *in personam* jurisdiction, it is asserted as an absolute requisite that there must have been conduct of the defendant's af

fairs within the State of the forum by the defendant or his or its agent physically present.

In arguing thus appellants wave aside all realistic appraisal of the effective reach of their activities as a whole into other States and put a premium upon artful avoidance of such States' power asserted on behalf of those of their citizens with whom business is done. To maintain that business is done only in the chosen State of incorporation or of domicile by an unauthorized mail order insurer ignores the results of the whole course of the business. Care to remain physically within distant boundaries no more confines business activities therein than does the fact that the insured never leaves his home State prevents the making of the contract. Where, by the use of instrumentalities such as the mails, an insurer is enabled to project the contracts which constitute the means of doing its business into other States, a fair appraisal of the facts compels the conclusion that it has transacted business therein. The fact that effective and binding contracts come into existence by this means even though the insured never physically leaves the State of his residence is ample evidence of real and substantial contact between insured and insurer therein. The independent agency of the post office as effectively accomplishes the out-of-state insurer's contact as does the retained agent who carries the solicitation or the policy to the insured. Indeed, it is the State of the insured's residence which has the most direct interest in the faithful performance of the contract and is most seriously affected by the contact thus effectuated.

Osborn v. Ozlin, 310 U. S. 53, indicates that the legitimate interest of a State in the subject matter of insurance transactions supports the exercise of its power even with respect to contracts made beyond its borders. Subsequent

ly, in *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, this Court measured the interest of New York in regulating reciprocal insurance "by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss". Earlier "conceptualistic" theories of the place of contracting or of performance were discarded as proper measures of the substantial interest of the State and the more recent recognition was affirmed that business may be being done in a State despite scrupulous care that the signing of contracts take place elsewhere.

The validity of statutes personally reaching out-of-state insurers with respect to local risks need involve no conflict with the doctrine of *Allgeyer v. Louisiana*, 165 U. S. 580. Some of the broader implications sought to be derived from that case have been restricted by this Court's view of its limitations (*Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; and see *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 535.) At best that case denies State power only where the insured deliberately goes beyond the borders of the State to seek coverage. We deal here with no such factor relating to an individual transaction. We are concerned with measures designed to effectuate the substantial local interest in the protection of local residents who have been sought out and reached in their home States and who have not intended or attempted to remove their insurance transactions from the local jurisdiction. In New York this is accomplished by making the local courts available to residents who have responded to solicitation, set in motion by out-of-state insurers not subject to the restrictions of New York license, which have reached them in New York, by applications sent from New York resulting in insurance contracts received by them in New York. Such transactions result in obligations effective in New York and which could be enforced there as to

obligations assumed by the insured. It is only provided that an insurer thus conducting its affairs so as to bring them into such intimate relation with the protective concern of the State by transactions extending into New York may be compelled to observe its obligations. This is done by a reasonable definition of those activities which when effected in New York by any instrumentality on behalf of a foreign insurer subject it to personal jurisdiction under provisions giving it adequate and actual notice.

In *International Shoe Co.* v. *Washington*, 326 U. S. 310, the touchstone of "presence" was denied as an absolute for sustaining jurisdiction *in personam* upon adequate notice. The court rejected the historical concept giving *in personam* jurisdiction only where the defendant's person is within the power of the court. It sustained such jurisdiction where the defendant's "minimum contacts" with a State were sufficient so that he could reasonably be required to defend a suit there arising out of such contacts, even though not then physically present in the forum. In this case there were salesmen of the defendant in the State and the old rule that "mere solicitation" did not authorize jurisdiction was rejected. It does not appear that the "minimum contacts" required by this decision could be satisfied only by the presence of such directly employed agents. "Mechanical" or "quantitative" criteria were not designed to be set. Under the New York statute the activities of the corporation which it projects into the State would "give rise to the liabilities sued on" and the defendant would have employed an instrumentality to carry its invitation physically into the State and set in motion there activities integrating into binding insurance contracts with local residents sent to them there. Those obligations arise "out of" and are "connected" with activities within the State procured by the defendant beyond its borders. "A procedure which requires the corporation to respond to a

suit brought to enforce them" upon adequate notice can no more than in the *International Shoe* case "be said to be undue".

In *United States v. Scophony Corp.*, 333 U. S. 795, the Court dealt with the provisions of the Clayton Act governing venue and service of process in anti-trust suits in the Federal courts. This permits the venue to be laid where the corporation is an "inhabitant" or in any district where it may be "found or transacts business". Service may be made "in the district of which it is an inhabitant or wherever it may be found". Both problems were presented. In considering the propriety of the venue the Court approved the approach previously taken in *Eastman Company v. Southern Photo Co.*, 273 U. S. 359, and refused to be limited by technical glosses of meaning which had earlier filled the concept of "carrying on business" with particularized refinements. It approved "the practical everyday business or commercial concept of doing or carrying on business 'of any substantial character' " as the test of venue.

The case presented no constitutional issue as to the utmost reach of congressional power. The Court, therefore, found no necessity of extending to the *Scophony* case the criteria formulated in the *International Shoe* case where the question was one of the jurisdiction of a State over a foreign corporation for purposes of suit and service of process (Note 13, p. 804). There is here a clear suggestion that where the problem is one of power the "minimum contacts" required to sustain it are even less than that transaction of business required by the Federal statute.

The Court went on to hold that *Scophony Corp.* was "found" in the district where service was made under any realistic view of the actual facts presented. The continuing and far reaching nature of the enterprise was held to make unnecessary consideration of precedents dealing with "the

very different businesses and activities of manufacturing and selling". The Court was mindful that otherwise, though venue could be supported, it would be impossible to make valid service on a corporation which was an "inhabitant" of a foreign country. This is a corollary to the remedial purpose it recognized in the Clayton Act to make venue possible without resort to forums distant from where the wrong was perpetrated, often an "insuperable obstacle". The Court felt that its ruling offered no conceivable offense to the ideas of "fair play and substantial justice" which had guided its decision as to State power in the *International Shoe* case.

State statutes permitting process to run to unauthorized foreign insurers with respect to matters arising out of activities coming into substantial contact with the interests of the State and of its citizens within its borders are similarly designed to remove obstacles otherwise preventing any practical method of enforcing local obligations. The continuing nature of the obligations sought to be assumed by such insurers, the paramount interest of the State of the insureds' residence in their faithful performance, the reality of the contact which is effected locally in the course of the business transactions involved, furnish a just and reasonable basis for making a foreign insurer amenable to local jurisdiction. The requirements of due process do not seem designed to create obstacles to local suit where the corporation has utilized methods bringing it into effective business contact with the State of the forum. Nor do they seem designed to prevent a State from exerting its protective power to assure that its citizens will not be exposed to fraud and misrepresentation in the place of their residence because notice of its action must be sent beyond the State by mail. Notice by mail is quite as adequate as the same medium is effective in bringing the corporation's activities within the State.

It is respectfully submitted that the provisions of the Virginia Securities Law involved herein should be held valid and constitutional.

Dated, November 7, 1949.

Respectfully submitted,

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Other States Joining Herein

The undersigned States, by their respective Attorneys General, do hereby join in the foregoing brief of the State of New York as *amicus curiae* and urge upon this Honorable Court the contentions therein advanced.

STATE OF NEW HAMPSHIRE,
By: WILLIAM L. PHINNEY,
Attorney General.

STATE OF MARYLAND,
By: HALL HAMMOND,
Attorney General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~982~~ 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,

Appellants.

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee.

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 802

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,

Appellants.

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions raised by this appeal, files this statement in opposition to Appellants' statement as to jurisdiction. Appellee includes

herein its motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the questions raised on behalf of the Appellants are so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

I

State Statute Involved and the Nature of the Case

A

The Statute

This appeal raises the question of the validity of certain provisions of the Virginia Securities Law or what is generally known as the Virginia Blue Sky Law, (Acts of the General Assembly of Virginia, 1928, Chapter 529, page 1373, and Acts amendatory thereof; Sections 3848 (47) to 3848 (66) inclusive of Michie's 1942 Code of Virginia). This statute requires every person, association or corporation desiring to engage in Virginia in the selling, promotion or offering for sale securities covered by the statute, to apply for a permit so to do. Certain conditions must be complied with before a permit is issued; the applicant is required to provide detailed information with reference to the securities and the solvency of the issuer of the securities and other matters relating to the propriety of their sale; and the State Corporation Commission of Virginia is authorized to conduct such investigation as it may deem appropriate and to see to the proper application of the proceeds from the sale of the securities. In general, the statute contains provisions similar to those usually contained in the "Blue Sky" laws of the various States. The Appellants do not deny that their membership contracts constitute "securities" within the meaning of the law, nor

do they claim to have applied for or secured the required permit to sell or offer them for sale in Virginia.

Section 15 of the Act (Michie's Code, Section 3848(61)) provides that any person violating the Act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a fine or confinement in jail, or both. Proceedings to enforce the penalties provided by this section for such violations must be instituted by indictment or information in the appropriate courts of record of the State.

Section 6 of the Act, as amended by Chapter 236 of the Acts of Assembly of Virginia of 1932, (Michie's Code, Section 3848(52)) authorizes the State Corporation Commission, upon its own motion, or upon complaint of any resident of the State of any violation of the Act, to issue a cease and desist order in the nature of a temporary and/or permanent injunction and restraining order against further violations, after at least ten days notice, by registered mail to persons, corporations or associations upon whom personal service can not be had because of absence from the State. Signed receipt of the registered notice is required to be returned by the postal authorities. It is this Section 6 of the Act, which is set out as Appendix A of the Appellants' Statement As To Jurisdiction, under which the proceedings here involved were brought, and it is this particular provision of the Virginia Securities Law which the Appellants contend is invalid.

Section 17 of the Act authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the Act.

B

The Facts

The Travelers Health Association is a non-profit membership association incorporated under the laws of Nebraska, with its home office in Omaha. Letters and other exhibits filed in the case show that the Appellant, R. E. Pratt, a resident of Omaha, is the Treasurer of said association and conducts its correspondence soliciting new membership contracts, which contracts provide health insurance protection. The association has not now, nor has it ever had, any office, officer, or agent, or any bank account or property located in Virginia. At the time of the hearing of this case it had in force in Virginia approximately eight hundred membership certificates, which provided health insurance protection in the form of sickness benefit payments. The association has caused many claims asserted by its Virginia members to be investigated in Virginia. (The Appellants question the finding of the Supreme Court of Appeals of Virginia that such investigations took place in Virginia, but, if investigations of claims on Virginia risks took place, as was admitted in the stipulation, it is difficult to imagine where such investigations would take place other than in Virginia.)

The customary method of soliciting new members has been for the Virginia members of the association to recommend to it persons who they believe to be likely prospects. The association then writes to these persons inviting them to make applications for membership. All such letters are transmitted by mail from the United States Post Office in Omaha and delivered by mail to the prospects in Virginia. If upon the receipt of this letter the applicant is so disposed, he fills out the application blank and sends it by mail to the home office of the association in Omaha, where it is received and acted upon.

The exhibits contained in the record include a letter from the Appellant Pratt, as Treasurer of the Association, addressed to a prospective member. The letter was accompanied by an application form containing twenty-six questions to be answered by the applicant, who is instructed after he has signed it to forward it "with membership fee to R. E. Pratt, Treasurer," Omaha, Nebraska. The application form contemplates reference to an existing member of the association for recommendation of the applicant for membership. There appears on the application the following:

> "Money Back Guarantee
> "Our policies are issued subject to approval of the applicant. If not satisfactory they may be returned within ten days from date of issuance and all money paid thereon will be refunded promptly."

In addition, there was also enclosed with the letter of solicitation a separate, printed "Absolute Guarantee" slip containing a provision in conformity with the one quoted above. On the face of this slip appears the following:

> "Note—It is not necessary to show the name of anyone as recommending you, as you have already been recommended to us by one of our members."

On the reverse side of said guarantee slip appears a printed copy of a letter from one of the members of the association residing at Baltimore, Maryland. In this letter the member expresses thanks for the promptness with which the association has paid benefits on account of his recent illness and concludes with this statement: "I am working on several of my friends to get them to join and expect to send you several applications real soon."

The Supreme Court of Appeals of Virginia held that the mailing of a copy of the letter received by the association from its Baltimore member stating that he was working on several friends and expected to send in their applications

constituted an implied invitation to its member not only to send in the names of persons recommended for membership, but also to solicit and send in completed applications for membership. The Court further held that, while old members have not been technically designated as agents of the association or employed to solicit for it, its encouragement of that activity and the acceptance of the fruits thereof by taking the same without question, and relieving the prospective member of the requirement of furnishing a reference, constituted a ratification of the efforts of the old members and rendered the association responsible therefor. The Court also held that the forwarding of the membership certificate to the Virginia applicant, subject to his approval, rendered it merely an offer on the part of the association and that it was the approval of the provisions of the certificate and the acceptance thereof in Virginia by the prospective member which consummated the contract.

The above statement of the facts is based upon the opinion of the Court below copied in Appendix B of the Appellants' Statement As To Jurisdiction, the Stipulation of Facts found at pages 6-7 of said Statement, and the exhibits filed with the record.

C

THE PROCEEDINGS BELOW

Pursuant to Section 6 of the Virginia Securities Act, proceedings were instituted against the Appellants by the State Corporation Commission of Virginia on May 5, 1947, in which the Appellants were charged with advertising, offering for sale and promoting the sale of the securities in question in Virginia without having procured the necessary permit or authorization and in contravention of the provisions of the Virginia Securities Act. Notices of the proceedings were sent to the Appellants by registered mail,

and the Post Office receipts, filed as exhibits, showed delivery of the same. The notice informed the Appellants that at the time indicated they would be given an opportunity to be heard upon whether a cease and desist order should be entered against them.

The Appellants appeared specially by counsel and objected to the jurisdiction of the Commonwealth of Virginia and the State Corporation Commission, basing their objections on the grounds asserted in this appeal. After the hearing the Commission entered the order complained of. The order recited the finding of the Commission that the Appellants had been engaged in the business of soliciting membership certificates in Virginia and in advertising, promoting, offering for sale, and in selling securities in Virginia without complying with the Virginia Securities Act. The order enjoined the Appellants from continuing such activities unless and until they complied with that statutory enactment. The Supreme Court of Appeals of Virginia affirmed this judgment.

The Question Presented

The only question presented by this appeal is whether the Commonwealth of Virginia may, after actual notice to the parties sent by registered mail and an opportunity for a hearing, order non-residents doing business in the manner and by the means adopted by the Appellants to cease promoting, advertising, offering for sale, and selling securities in Virginia unless and until they comply with the Virginia Securities Act by securing a permit or authorization from the State Corporation Commission in accordance with law. Stated differently, does an order, based upon such notice and hearing, directing the Appellants to cease violating the law of the Commonwealth of Virginia constitute due process of law.

II

ARGUMENT

A

The Commonwealth of Virginia May Regulate the Promotion of the Sale of Securities by Non-residents or Residents Alike, Whether the Same Be Carried on by the Use of the Mails or Not.

It is settled beyond controversy that the regulation of the promotion and sale of securities is a proper exercise of the police power of the States. *Hall v. Geiger*, 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493; and *Merrick* v. *N. W. Halsey & Company*, 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498.

The promotion of the sale of securities within Virginia, their advertisement in this State, offers for their sale made here and their actual sale here are very much the concern of the Commonwealth and the regulation of those engaged in such activities is a matter clearly within the police power of the State. The regulation of such activities is even more important when they are conducted by non-residents because of the difficulties which citizens of this State would have in securing redress from such non-residents in cases of fraud.

A person may throw a stone, shoot a gun, or send libelous material through the mails, across State borders. Likewise he may send advertising, promotional material and offers for the sale of securities across State borders. Just as the receiving State may take action to prevent the more violent actions first mentioned, it can provide for the regulation of activities by non-residents who promote, within its borders, the sale of securities. The latter, if not subject to regulation, can be even more vicious than the former.

That a State may regulate the promotion of the sale of securities within its borders when such activities are carried on by non-residents through the mails was clearly recognized in *Merrick* v. *N. W. Halsey & Company, supra.* In that case a partnership composed of residents of New York and New Jersey attacked the Michigan Blue Sky Law. They had no offices in Michigan, had no salesmen there, but merely solicited orders for the purchase of securities by means of the mails. They wished to continue making further offers in the State without complying with the statute. The District Court of the United States for the Eastern District of Michigan enjoined the enforcement of the statute. Upon appeal the Supreme Court reversed the District Court and sustained the power of the State of Michigan to regulate their sales of securities through the mails.

That the regulation by a State of the promotion of the sale of securities when carried on through the United States mails does not interfere with the power of Congress to establish post offices and post roads and to regulate the use of the mails is clearly shown by the fact that Congress, in enacting legislation regulating the sale of securities by means of the use of the mails, expressly provided as follows:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." Title I, Section 18, of the Securities Act of 1933 (Title 15, Section 77-r of United States Code, Annotated).

It was clearly the intention of Congress to leave the States free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and in the absence of such conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction. If the use of the mails by

the Appellants results in a violation of the laws of Virginia regulating the sale or promotion of securities, the acts of the Appellants become subject to appropriate action by Virginia. *In re Pallister*, 136 U. S. 257, 10 S. Ct. 1034, 34 L. Ed. 514; *United States* v. *Steinberg*, 62 F. (2d) 77, Cert. Den. 289 U. S. 729, 53 S. Ct. 526, 77 L. Ed. 1478

B

Notice of the Proceedings under Section 6 of the Virginia Securities Law Sent by Registered Mail and Actually Received Was Sufficient upon Which to Base the Cease and Desist Order Against the Appellants.

Since the activities of the Appellants in Virginia, though carried on largely through the mails, are properly subject to regulation by Virginia, an order directing them to cease their activities unless and until they have complied with the laws of Virginia, issued after notice sent by registered letter and actually received by them and after they have been given an opportunity to be heard in no way fails to afford the Appellants due process of law.

The proceedings here do not involve the rendition of a pecuniary civil judgment against the Appellants and the order entered has no such effect. The proceedings were instituted by the Commonwealth to determine whether the activities of the Appellants did in fact constitute a violation of the Virginia Securities Act and, when this fact was established, the order entered against the Appellants simply directed them to cease their activities until they complied with the Virginia law.

The Appellants carry on activities in Virginia which affect Virginia citizens. Not only are these activities carried on through the mails, but they are supplemented by other activities in Virginia described by the Court below, that is, the encouragement of Virginia members to solicit applications

from other prospects and the acceptance of their efforts in this respect; the contracts are consummated in Virginia by the acceptance on the part of the applicant; the investigation of claims on Virginia risks; and the performance of the contracts in Virginia by the payment of such claims.

Service of process upon non-residents of a State by registered mail in appropriate cases is a well established practice. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446; *Storey* v. *United Insurance Co.*, 64 F. Supp. 896 (D. C. East Dist. of S. C.) and in a case arising under the Blue Sky Law of New Jersey, *Wilentz* v. *Edwards*, 134 N. J. Eq. 522, 36 Atl. (2d) 423.

In *International Shoe Company* v. *State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the Supreme Court sustained the jurisdiction of the Washington State Courts to entertain an action for the recovery of unemployment compensation taxes arising out of salaries paid the agents of the company for their services in soliciting orders in the State, although the solicitors had no authority to bind the company or to accept service of process, their authority being strictly limited to taking orders and submitting them to the home office of the company in St. Louis, Missouri. In that case Mr. Chief Justice Stone said:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer *v.* Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it

suelf that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' • • •

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact; Klein *v.* Tax Supers. 282 U. S. 19, 24, 75 L. ed. 140, 143, 51 S. Ct. 15, 13 ALR 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in Hutchinson *v.* Chase & Gilbert (CCA2d) 45 F 2d 139, 141. *Those demands may be met by such contacts of the corporation with the state of the forum* as make it reasonable, in the context of our federal system of government, to require the corporation to defend the *particular suit which is brought there.* An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson *v.* Chase & Gilbert, supra (45 F 2d 141).

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. • • •

• • • • • • •

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that

state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

* * * * * * *

"Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

"We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. *It is enough that appellant has established with contacts within the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.* * * * *Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.* * * *"
(326 U. S. 310, 316-318)

In the present case it was the "activities" of the Appellants in Virginia which gave rise to this particular suit. The method of substituted service was certainly calculated to apprise the Appellants of the suit since it resulted in actual notice to them. It is certainly consonant with traditional notions of fair play and substantial justice to require the Appellants to answer in Virginia an action to direct them to comply with Virginia statutes if they wish to continue their activities in Virginia.

Conclusion

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Appeals of Virginia.

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(2546)